150 U S 170
150 U S 170

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 912.

STEPHEN W. CAREY AND OTHERS,
Appellants,

vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY AND OTHERS,
Appellees.

Extracts from the Record on Motion of Appellees to Dismiss the Appeal.

C. G. Burgoyne, Walker and Centre Streets, New York.

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No. 1.

Original Bill of Complaint. Filed December 23, 1889.

In the Circuit Court of the United States for the Eastern District of Texas.

To the judges of the circuit court of the United States for the eastern district of Texas, sitting in equity:

S. W. CAREY, a citizen and resident of the State of New Jersey; Warren S. Sillcocks, a citizen and resident of the State of New York; J. Van Schaick, a citizen and resident of the State of New York; Julius A. Kohn, a citizen and resident of the State of New York; D. P. Ingraham, Jr., a citizen and resident of the State of New York; James Landale, a citizen of Great Britain; George Wilson, a citizen of Great Britain, and Andrew S. McClelland, a citizen of Great Britain, in their own behalf and in behalf of all others similarly situated who may come in and contribute to the expense of this action, bring this their bill of complaint

against

THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY (No. 1), a corporation created by and existing under the laws of the State of Texas and a citizen of the said State, having its main office and domicil in the city of Houston, county of Harris, within the eastern district and State of Texas; The Houston & Texas Central Railway Company (No. 2), a corporation created by and existing under the laws of the State of Texas and a citizen of the State of Texas, having its office and domicil within the eastern district and State of Texas; The Central Trust Company of the City of New York, a corporation existing under and by
2 virtue of the laws of the State of New York and a citizen of said State; The Farmers' Loan & Trust Company of the City of New York, as trustee, a corporation existing under and by virtue of the laws of the State of New York and a citizen of

said State ; Nelson S. Easton and James Rintoul, as trustees, who are respectively residents and citizens of the State of New York ; Benjamin A. Shepherd, surviving trustee, a resident of the city of Houston and State of Texas and a citizen of said State ; Frederic P. Olcott, George E. Downs, who are respectively residents and citizens of the State of New York ; The Southern Pacific Company, a corporation organized under and by virtue of the laws of the State of Kentucky and a citizen of said State ; Nelson S. Easton, Charles Dillingham, and James Rintoul, as receivers, the said Charles Dillingham being a resident and citizen of the State of Louisiana, and the said Easton and Rintoul residents and citizens of the State of New York ; Collis P. Huntington and Issac E. Gates, respectively residents and citizens of the State of New York ; J. G. Schriever, a resident and citizen of the State of Louisiana ; A. C. Hutchinson, a resident and citizen of the State of Louisiana ; E. W. Cave, a resident and citizen of the State of Texas ; Charles Dillingham, a resident and citizen of the State of Louisiana ; J. J. Atkinson, a resident and citizen of the State of Texas ; A. H. Swanson, a resident and citizen of the State of Texas ; Charles Fowler, a resident and citizen of the State of Texas ; John S. Waters, Samuel W. Fields, A. W. Childress, R. B. Ascue, T. R. Pierce, Jr., William J. Jardine, M. Early
3 John B. Haynie, Robert B. Hickman, Marshal H. Levy, Albert E. Jenkins, Thomas Maroney, T. H. Arnold, J. M. Kewley, John C. Greer, S. R. Baykin, Daniel A. Cabeen, Isaac B. Clark, Henry Malloy, Charles A. Bussey, Jerry O'Hare, Abraham Meyer, James Patten, William Brinn, J. M. Justice, Margaret Farris, John Butler Terrell, J. T. Bennett, James Carson, George A. Hill, Thomas M. Shirley, Charles L. Beisner, G. Mayhoff, Lizzie Lee, Alfred J. Barrager, Elizabeth Peregoy, Cyrus Smith, Michael Tierney, John J. Atkinson, Samuel Ayers, Robert Brewster, who are respectively residents and citizens of the State of Texas, within the eastern district and State of Texas, and The Lone Star Land Company, a corporation organized and existing under the laws of the State of Texas and a citizen of said State, having its office within the eastern district and State of Texas.

And thereupon your orators complain and say that one of them, S. W. Carey, is a citizen and resident of the State of New Jersey ; and that others, to wit, Warren S. Sillcocks, T. Van Schaick, Julius A. Kohn, and D. P. Ingraham, Jr., are citizens and residents of the State

of New York, and that others of them, to wit, James Landale, George Wilson, and Andrew S. McClellan, are citizens of Great Britain, and that the defendant The Houston & Texas Central Railway Company (which for convenience and for the purpose of designating the same is hereinafter called No. 1) was and is a corporation duly organized and existing under the laws of the State of
4 Texas and engaged in the operation of a railroad in said
State, having its main office and domicil in the city of Houston and county of Harris and within the eastern district and State of Texas.

The said company was originally created and first known as the Galveston and Red River Railroad Company, created by an act of the legislature of the State of Texas entitled "An act to establish the Galveston and Red River Railroad Company," approved March 11th, 1848, and acts of the legislature of the said State supplemental thereto and amendatory thereof, including an act of the legislatue of that State entitled "An act amendatory of and supplemental to 'An act to establish the Galveston and Red River Railroad Company and several acts supplemental thereto,'" passed September 1, 1856, and duly approved, in and by which latter act the name of the company was changed and declared to be the Houston & Texas Central Railway Company and was invested with the right of making, owning, and maintaining a railway from Galveston bay or its contiguous waters to the Red river.

Thereafter and by an act passed May 24th, 1873, by the legislature of the State of Texas the Waco & Northwestern Railroad Company, a duly organized corporation, was, with all its privileges, franchises, rights, and properties, merged in the Houston & Texas Central Railway Company and became a part thereof.

That at the times of the grieveances hereinafter mentioned the said company, No. 1, owned, possessed, and operated by authority of law the following lines of railway, namely:

5 *(a.)* A line from Houston to Denison, a distance of about three hundred and forty-five miles, commonly known as the main line.

(b.) A line from the main line at Hempstead to Austin, a distance of about one hundred and eighteen and three-fourths miles, commonly known as the Western division.

(c.) A line from the main line at Bremond to Ross, a distance of about fifty-seven miles, commonly known as the Waco and Northwestern division.

That in addition the said company No. 1, by various statutes of the State of Texas, for the purpose of aiding in the construction and equipment of the said railway, received from the said State of Texas sixteen sections or square miles of the public domain of said State, equal to 10,240 acres of land, for each mile of its road built, and for each mile thereof that would be built in the future as the same should be built.

2. That complainants are stockholders of the Houston & Texas Central Railway Company, and many of them, to wit, S. W. Carey, Warren S. Sillcocks, J. Van Schaick, Julius A. Kohn, D. P. Ingraham, Jr., and George Wilson, have been such for many years, having purchased shares in the capital stock of said corporation at different times prior to the transactions and grievances hereinafter complained of, and complainants further state that the stock held and owned by your orators amounts in value to a large sum, to wit, $570,000, that being the par value of the 5,700 shares held and owned by them.

6 3. The said company on or about the times of their respective dates executed the following mortgages or deeds of trust:

(*a.*) A mortgage or deed of trust commonly called the main line first mortgage, dated July 1st, 1866. This mortgage was executed to Shepherd Knapp and David S. Dodge, as trustees, who, however, were subsequently superseded by the defendants Nelson S. Easton and James Rintoul, both of whom qualified and entered upon the discharge of their duties as such. The said mortgage was given to secure the payment of a series of first-mortgage bonds for one thousand dollars each, bearing even date with the said mortgage, to be issued at the rate of not exceeding $20,000 per mile of railway then built and thereafter to be built over the route of its said main line, payable on July 1st, 1891, with interest at seven per cent. per annum, payable semi-annually, on the 1st days of July and January in each year, until the principal should be fully paid and satisfied. This mortgage covered the main line, commencing at the city of Houston and extending to the Red river, in said State of Texas, and also all and singular ten sections or square miles of land for each mile of the said main line of railway then built and thereafter to be built, equal to 6,400 acres of land for each mile.

(*b.*) A mortgage or deed of trust commonly known as the Western division first mortgage or deed of trust, dated December 21st, 1870, executed to Shepherd Knapp and William Walter Phelps, as

7 trustees, who, however, were subsequently superseded by the said defendants, Easton and Rintoul, both of whom qualified and entered upon the discharge of their duties as such. The said mortgage was given to secure the payment of a certain series of first-mortgage bonds for one thousand dollars each, bearing even date with said mortgage or deed of trust, to be issued at the rate of not exceeding twenty thousand dollars per mile of railway then built and thereafter to be built over the route of its said Western division, and payable on July 1st, 1891, with interest at seven per cent. per annum, payable semi-annually, on the first days of July and January in each year, until the principal shall be fully paid and satisfied. This mortgage covered the said Western division of the said railway, commencing at a point on the main line in the city of Hempstead, in Austin county, and extending to the city of Austin, Travis county, in the State of Texas, and also embraced all and singular the ten sections or square miles of land for each mile of the said Western division of the said railway then built and thereafter to be built.

(*c.*) A mortgage or deed of trust commonly known as the Waco & Northwestern division first mortgage, dated June 16th, 1873, executed to the defendant The Farmers' Loan and Trust Company of the City of New York, as trustee, which was at the said time and still is a corporation organized and existing under the laws of the State of New York, having its principal place of business in the city of New York. The said mortgage covered the said Waco & Northwestern division of the said railway, and also six thousand acres of land per mile of road completed.

8 (*d.*) A mortgage or deed of trust commonly known as the main line and Western division consolidated mortgage, dated October 1st, 1872. This mortgage was executed to the said defendant, The Farmers' Loan & Trust Company, as trustee, and was given to secure the payment of a certain series of first consolidated mortgage bonds for one thousand dollars each, bearing even date with said mortgage or deed of trust, to be issued to the extent of fourteen millions of dollars, but in no case to exceed in the aggregate thirty thousand dollars per mile of road under that or any previous issue, payable in October, 1912, with interest at eight per cent. per annum, payable semi-annually, in October and April of each year, until the principal shall be fully paid and satisfied, which said mortgage covered and embraced *in* the main line of said railway, extending from the city of Houston, in Harris county, through the counties of Grimes, Brazos, Robertson, Limestone, Navarro, Ellis,

Dallas, Collins, and Grayson, to the Red river, on the northern boundary of the said State, and also all the line of the Western division of the said railway, extending from the city of Hempstead, in Washington county, through the county of Bastrop, to the city of Austin, Travis county, together with six several sections *of* square miles of land, being three thousand eight hundred and forty acres per mile of road completed, upon the said main line and Western division consolidated mortgage.

(*e.*) A mortgage or deed of trust commonly known as the
9 Waco and Northwestern division consolidated mortgage, dated
May 1st, 1875, and was executed to the said Farmers' Loan & Trust Company, as trustee, and was given to secure the payment of a series of its consolidated mortgage bonds, to be issued to the extent of ten thousand dollars per mile of road completed of the said Waco & Northwestern division, in addition to the twenty thousand dollars per mile of bonds, payment of which was secured by the said Waco & Northwestern division first mortgage, which said bonds were of even date with the said mortgage or deed of trust, and payable May 1st, 1915, with interest at eight per cent. per annum, payable semi-annually on the first days of May and November in each year until the principal shall be fully paid and satisfied, the said mortgage embracing and covering the railway of the company known as the Waco & Northwestern division, then built and to be built, beginning at a point on the main line of said railroad in the town of Bremond, Robertson county, passing through the city of Waco in McLennan county, to the Red river, and thence to the northern boundary line of said State, including also and covering six thousand acres of land per mile of completed road of the said division.

(*f.*) A mortgage or deed of trust dated May 7th, 1877, commonly known as the income and indemnity mortgage, executed to Thomas W. House and the defendant Benjamin A. Shepherd, as trustees.
Subsequently and prior to the commencement of this action
10 the said House departed this life, leaving the said Benjamin
A. Shepherd as sole acting trustee. The said mortgage was given to secure the payment of a series of income and indemnity mortgage bonds aggregating one million five hundred thousand dollars, bearing even date with the said mortgage payable May 1st 1887, with interest at seven per cent. per annum,—on the first days of July and January of each year until the principal shall be fully paid and satisfied, the said mortgage covering the railway of the

said defendant, The Houston & Texas Central Railway Company (No. 1), then completed, namely, from Houston to the Red river, from Hempstead to Austin, from Bremond to Waco, and ten miles completed of the Waco & Northwestern division beyond Waco, and also all the lands and land grants acquired and received and to which *to* said company was entitled to from the said the State of Texas for the construction of its said railway.

(*g.*) Subsequently to the execution of the said mortgages and on or about the first day of April, 1881, the said company executed another mortgage or deed of trust, dated on said day, to the defendant The Farmers' Loan & Trust Company, as trustee shown and herein referred to as the general mortgage, covering all and singular all of the railways of the said company and all its franchises, being in the aggregate about five hundred and twenty and three-fourths miles of railway in active operation, including all its real and personal property then acquired or which immediately thereafter
11 should be acquired in the State of Texas, and all and singular
the several sixteen sections or square miles or ten thousand two hundred and forty acres of land per mile for each mile of completed road on its main line from Houston to the Red river, and on its branch line from Hempstead to the city of Austin, and on its branch line from Bremond to Ross, granted by the said State of Texas to aid the said railroad, and all its town lots acquired by gift, purchase or otherwise. The said mortgage was executed to the said trust company to secure the payment of a series of its general mortgage bonds to the amount of eighteen million five hundred thousand dollars; all of which were dated April 1st, 1881, and were for the sum of one thousand dollars each, and made payable April 1st, 1921, with interest at the rate of six per cent. per annum, to be paid semi-annually on the first days of October and April in each year until the principal should be fully paid and satisfied.

That the said general mortgage was executed to the said trustees in trust for the uses and purposes therein mentioned, one of which being that the sum of sixteen million eight hundred and twenty-three thousand dollars of said bonds should be reserved by the trustees, and not issued except for the purpose of exchanging and retiring the bonds then outstanding issued by the railway company, and the payment of which bonds was secured by lien upon
12 some portion of its railway and property, and specified as
follows:

Amount due the State of Texas for loans from the school fund	$300,000 00
First-mortgage main line bonds	6,262,000 00
First-mortgage Western division bonds	2,270,000 00
First-mortgage Waco & Northwestern division bonds	1,140,000 00
Main line and Western division second-mortgage bonds	4,784,000 00
Waco & Northwestern division second mortgage bonds	567,000 00
Income and indemnity mortgage bonds	1,500,000 00
Total	$16,823,000 00

The balance of the said bonds, aggregating one million six hundred and seventy-seven thousand dollars, the trustees were directed to sign and deliver to the railroad company, to be used by the management in retiring the floating debt and for the improvement, equipment, and betterment of the road; that in and by the said general mortgage it was provided, as hereinbefore stated, that the entire income and indemnity mortgage bonds should be retired and exchanged for bonds of an equal amount secured by the said general mortgage; that according to the provisions of the said general mortgage or deed of trust the said trustees did accordingly receive, pay, retire and exchange, prior to the institution of the proceedings and actions hereinafter mentioned, all of the said income and indemnity mortgage bonds, excepting one bond for five hundred dollars, and issued in the place and stead thereof the general
13 mortgage bonds, equal in amount to one million four hundred and ninety-nine thousand five hundred dollars, payable April 1st, 1921, with interest at the rate of six per cent. per annum, which was accepted and received by the holders of the income and indemnity mortgage bonds in exchange and payment of the said bonds.

4. Complainants further allege on information and belief that in and prior to the year 1883 a majority of the stock of the Houston & Texas Central Railway and a controlling interest in the company was owned by a corporation created and existing under the laws of the State of Louisiana, known as Morgan's Louisiana & Texas Railroad & Steamship Company, and in the early part of the year 1883 the defendant Collis P. Huntington, who was, as complainants allege on information and belief, interested in and a large stockholder

of the Southern Development Company (a corporation organized under the laws of the State of California) and who with his associates controlled the same, formed a syndicate with his associates for the purpose — acquiring in his own interest and that of the Southern Development Company the control of the said Houston & Texas Central Railway Co.; that accordingly the said Huntington and his said associates acquired by purchase in the early part of the said year the stock and controlling interest in the said Morgan's Louisiana & Texas Railroad & Steamship Co., by means of which ownership of the said stock of the said Morgan's Louisiana & Texas
Railroad & Steamship Co. said Huntington and his associates
14 were able to control said last-mentioned company and to
guide and prescribe its voice and vote in respect of the stock of the said Houston & Texas Central Railway Company and to name and elect its officers and directors.

Complainants further allege on information and belief that in 1884 the Southern Pacific Company was chartered under the laws of the State of Kentucky, of which company the said Huntington was and is vice-president and with his said associates owns a majority and controlling interest therein; that the latter company acquired the interest of the said Southern Development Company in Morgan's Louisiana & Texas Railroad & Steamship Company, by reason whereof they were able to and have controlled the Houston & Texas Central Railway Company and to name and elect its officers and directors; that the said Southern Pacific Company was interested in connecting roads in conjunction with which it was desired that the Houston & Texas Central Railway should be operated.

That at said time the said Houston & Texas Central railway was the oldest and most reliable railway in the State of Texas and owned valuable land grants from the State of Texas, which amounted at that time, as complainants allege on information and belief, to about five million five hundred thousand acres.

After the said syndicate obtained control of the Houston & Texas Central railway the stock immediately commenced to depreciate
and continued to depreciate until, through the acts, suits, and
15 proceedings hereinafter more fully referred to, all rights of
the holders of the stock of the said company were sought and attempted to be effectually shut out and barred and the absolute control of the company acquired by said syndicate, so that the rail-

way might be run solely in the interest of the said syndicate and the said Southern Pacific Company.

When the said syndicate acquired a controlling interest in the Houston & Texas Central railway its stock was quoted and sold in the market at 88 and ½ per share ; in 1884 it was sold at 51 ; in 1885 at 39 and ¼ ; in 1886 at 41 ; in 1887 at 45 ; in 1888 at 23 ; in 1889 at 13 and ⅛, and on the announcement of the assessment hereinafter mentioned the market value of the stock fell to one dollar a share.

That in January, 1885, when the holders of the first mortgage bonds (main line and branches) presented their coupons for payment it was so manipulated that they could only have them cashed by selling them to the Southern Development Company ; that thereupon and in the same month of January, 1885, the Southern Development Company commenced a suit against the Houston & Texas Central Railway Co. (No. 1) in this court, in which it was claimed that the said railway company was indebted to the Southern Development Co. in the sum of six hundred thousand dollars for money loaned and advanced at various times during the preceding six years, and on the 20th of February, 1885, the appointment of receivers was procured in said action, to wit, Charles Dillingham,
16 one of the directors of the Houston and Central Railway Company and Benjamin G. Clarke. The said order appointing the receivers was made with the consent of the said railway company No. 1, through its solicitors. On the 21st day of January, 1886, the defendants Easton and Rintoul, trustees, filed two bills of complaint in this court for foreclosure, and subsequently, on the 20th of April, 1886, the Farmers' Loan & Trust Company filed a bill in this court, which said bills were described on the docket as Nos. 198, 199, and 201 respectively, and at the May term, 1886, of this court, all the parties consenting, the causes were consolidated as No. 198.

During the said May term of the court the said suit of the Southern Development Company was dismissed, and thereupon the said Nelson S. Easton, James Rintoul, and the said Charles Dillingham were appointed joint receivers of the said Houston & Texas Central Railway Co. in said consolidated cause, the said company through its counsel consenting to such appointment.

The said consolidated cause so prosecuted by the said trustees was founded and based substantially upon the default made in January, 1885, hereinbefore referred to, in the payment of the interest on the said bonds and the interest falling due thereafter. None of

the bills nor the consolidated cause was founded upon or sought to secure the foreclosure of the mortgage known as the Waco & Northwestern division, dated June 16, 1873, and referred to in subdivision C of paragraph 2 of this complaint. At the time of the commencement of the said suits, to wit, January and April,
1886, none of the bonds issued had matured and on part of
17 the principal had become due; that the principal of the
bonds secured by the main line first mortgage, referred to in
subdivision A of paragraph of this complaint, will not mature until July 1st, 1891; that the bonds secured by the Western division first mortgage, referred to in subdivision B of said paragraph, will not mature until July 1st, 1891; that the bonds secured by the mortgage known as the main line and Western division consolidated mortgage, referred to in subdivision D of said paragraph, will not mature until October, 1912; that the bonds secured by the mortgage commonly known as the Waco & Northwestern consolidated mortgage, referred to in subdivision E of said paragraph, will not mature until May 1st, 1915; that the bonds secured by the income and indemnity mortgage, referred to in subdivision F of said paragraph, did not mature until May, 1887, after the commencement of said suits; that said income and indemnity mortgage bonds, as hereinbefore set forth, were all retired and exchanged prior to the commencement of the said suits for the funds secured by the general mortgage which was made and executed April 1st, 1881 (excepting one of the bonds for five hundred dollars), and the said bonds secured by the general mortgage, referred to in subdivision G of said paragraph, will not mature until April 1st, 1921.

5. That in none of the said several mortgages is it provided that the failure to pay interest upon any of the bonds shall be taken to
precipitate the maturity of the principal, nor do they provide
18 for or permit the sale of the said railway prior to the maturity
of the principal of the bonds referred to in the said respective
mortgages.

6. That the main line first mortgage, upon which said bill No. 198 was founded and based, provided by its terms that if default be made in the payment of interest which should become due upon said bonds the trustees, at the request of any bondholder, were required to make a demand in writing on the president or secretary of the company for the payment of interest in arrears, and if the company made default for sixty days after said time the trustees were empowered to take possession of the road and use, operate, and work the

same, and, after paying the expenses of running and operating the road and for needful and necessary repairs, apply the net profits to the payment and discharge of the interest, when and whereupon the said railway, with its appurtenances, was to be surrendered and delivered back to the said railway company; and it was further provided that if default be made in the principal the trustees should proceed to sell the lands which were conveyed and which remained unsold, and if the proceeds of such sale should not be sufficient to pay off the said bonds and interest in full, then the trustees were directed at the end of six months from the time of the maturity of the bonds to sell the road to the highest bidder at public auction to which mortgage referred to in the decree hereinafter mentioned complainants beg leave to refer and make part hereof.

19 The Western division first mortgage, upon which said Easton and Rintoul filed their bill No. 199, contains provisions substantially similar in all respects.

The general mortgage, executed April 1st, 1881, embraced in said consolidated cause, contains substantially similar provisions. The mortgages known as the main line and Western division consolidated mortgage and Waco & Northwestern division consolidated mortgage provides that in case the company failed to pay the principal or the interest upon bonds as they become due and for sixty days after demand the trustees were empowered to enter upon the road, operate and manage the same, and, after paying taxes and counsel fees and necessary expenses in connection with the operation of the road and for proper repairs, apply the surplus to the payment of interest or principal due and assume the management of the road until the principal and interest are paid or the property sold, as provided in the mortgage, but such sale was to be had only in case default should be made in the principal sum of the bonds at maturity and proper proceedings were commenced to procure a decree of sale of said premises and property, which proceedings the trustees were required to commence at the request, in writing, of a majority of the holders of the bonds so in default.

Complainants further allege that the answer of the railroad company in said suits expressly placed in issue by denying that the principal sum of the said bonds had become due or demandable, and averred that the court was not authorized to set aside the terms and provisions of the deed of trust and decree the principal
20 of the bonds issued under the said deed to be due when the
same were not due until years after the filing of the bill, and

that the court had no power to decree that the railways belonging to the said Houston & Texas Central Railway Co. should be sold prior to the maturity of the bonds or sold prior to the sale of all the lands covered by the said deeds of trust; and in the answer it was further averred that if the lands received by grants from the State of Texas were carefully administered and converted into money at a reasonable price by the railroad company or by the receivers the proceeds of the sale would so materially reduce the indebtedness of the company that it might reasonably hope to be able to pay the whole of its floating debt and the principal of its bonds upon the dates they become due.

7. Complainants further aver on information and belief that after the filing of the said answer and until after the making of the organization agreements, hereinafter referred to, no testimony was taken in the said suit; that while the suit was in that condition and on or about December 27th, 1887, an agreement was entered into by a majority of the holders of the mortgage bonds (with the possible exception of those upon the Waco & Northwestern division, as to which division a sufficient number of bondholders could not be brought into an arrangement for reorganization) and the Southern
Pacific Co. and the Central Trust Co. for the reorganization
21 of the said Houston & Texas Central Railway Company, by
the terms of which agreement a plan of reorganization was agreed upon between the parties to said instrument, by which they agreed to consent to a foreclosure of the said mortgages, and by which it was further agreed that a new company should be organized which shall acquire all the property and franchises of the present company designated herein as the Houston & Texas Central Ry. Co. No. 1, and thereafter issue new bonds equal in amount to the principal of the outstanding consolidated mortgage and general mortgage bonds in the following proportions: The present holders of the first mortgage bonds were to receive new bonds in equal amount, and in addition to be paid the face value (without interest) of the unpaid coupons up to and including the coupons maturing July 1st, 1887, and also a bonus of fifty dollars in cash upon each bond; the interest upon the said bonds was to be guaranteed by the Southern Pacific Company. The holders of the consolidated mortgage bonds were to receive new bonds, with interest at the rate of six per cent., and in addition to receive debenture bonds, with interest, payable semi-annually, at the rate of six per cent., for three-fourths of the face value (without interest) of the unpaid coupons to and including

those maturing October 1st, 1887, both the principal and the interest of the said debenture bonds to be quaranteed by the Southern Pacific Company. The holders of the general mortgage bonds, including nine hundred and forty-five bonds alleged to have been hypothecated with the Southern Development Company, Morgan's Louisiana & Texas Railroad & Steamship Company, and the 22 National City Bank, to receive new bonds, bearing four per cent. interest, and in addition to receive debenture bonds, bearing interest, for two-thirds of the face value (without interest) of the unpaid coupons to and including the coupons maturing October 1st, 1887, both the principal and the interest of the debenture bonds to be guaranteed by the Southern Pacific Company, and the interest upon the general mortgage bonds was also to be guaranteed by the Southern Pacific Company, and the new company was to issue stock in the sum of ten million dollars.

That though none of the stockholders of the company No. 1 as such were parties to the said agreement, it was in and by the said agreement or plan of reorganization provided that the present holders of the capital stock of said Houston & Texas Central Railway might, within a time to be prescribed by the Central Trust Comany, receive, if they elect so to do, a proportionate share of the capital stock of the new company equal in proportion to the stock held by the said stocknolders on paying a proportionate amount of the sums necessary to discharge the whole floating debt of the company and the cash payments to be made under the said plan for interest and bonus and the necessary charges and expenses to be incurred in the said reorganization; that said Morgan's Louisiana & Texas Railaoad and Steamship Company was, as complainants allege on information and belief, the main or principal holders and owners of the floating debt of the company, being such owners to the amount of $1,594,364.14 as claimed by them; and in the said agreement it was further provided that in the 23 event that any portion of the capital stock should not be taken up by the said stockholders or holders of the floating debt, as provided in said agreement, then the Southern Pacific Company, on paying only the cash necessary to pay the interest and bonus to the holders of the first-mortgage bonds and coupons and other charges and expenses to be incurred in the said reorganization, were to be entitled to the capital stock of the new company not so taken up; that the said Central Trust Company was agreed upon as the purchasing trustee, with whom the bonds were to be deposited, and who was authorized to bid in and pay for the road on foreclosure and to carry out the proposed reorganization, a copy of which plan of reorganization is on file with the clerk of this court, and to which reference is hereby made.

That the negotiations in reference to the said plan of reorganization were had mainly with the said Huntington, and many meetings to arrange the same were held at his office, as complainant alleges upon information and belief, but as hereinbefore stated, none of the stockholders of said company No. 1 as such were parties to the said agreement.

8. After the execution of the said agreement or plan of reorganization by the said bondholders and in pursuance thereof and of the scheme mapped out, the complainants in said consolidated cause, during the May term of 1888 of this court, applied for and on consent procured to be entered a decree in the said consolidated
24 cause; that the only testimony in the cause were certain formal depositions of the trustees and others on behalf of the complainants taken after the making of said reorganization agreement; to which depositions, on file with the clerk of this court, complainants beg leave to refer; that, as appears from the docket of the clerk, the depositions were filed May 3d, 1888, and publication made May 4th, 1888, though the cause is purported to have been submitted on May 3d, and the decree, which consisted of about one hundred and fifty folios, filed and entered May 4th; to which docket complainants beg leave to refer; but no testimony was taken or submitted on behalf of the defendants in said suit or to sustain the defenses interposed in the answer nor any evidence offered by the complainants or submitted to the court rebutting the defenses which were raised and presented by the pleadings.

That in and by said decree, procured as aforesaid by consent, it was ordered, adjudged, and decreed that the Houston & Texas Central Railway Company (No. 1) on or before the expiration of thirty days from the date of said decree pay into court the following sums in addition to a sufficient sum to pay the costs of the cause:

(*a.*) The amount of the principal of the bonds secured by the main line first mortgage, with seven per cent. interest thereon from January 1st, 1888, inclusive of the coupons due January 1st, 1888, with six per cent. interest in gold and silver coin of the United States.

(*b.*) The amount of the principal of the bonds secured by the Western division first mortgage, with seven per cent. interest

25 from January 1st, 1888, and the amount of the unpaid coupons, inclusive of coupon due January 1st, 1888, with six per cent. interest in gold and silver coin of the United States.

(*c*.) The principal of the bonds secured by the main line and Western division consolidated mortgage, with eight per cent. interest thereon from April 1st, 1888, and the amount of due and unpaid coupons, inclusive of the coupons due April 1st, 1888, with six per cent. interest.

(*d*.) The principal of the bonds and unpaid coupons secured by the Waco & Northwestern division consolidated mortgage, with interest at eight per cent. from May 1st, 1888, inclusive of the coupons due May 1st, 1888, with six per cent. interest.

(*e*.) The amount of the principal and unpaid coupons secured by the income and indemnity mortgage, with seven per cent. interest, inclusive of the coupons due May 1st, 1887, with eight per cent. interest from the maturity thereof.

(*f*.) The amount of the principal of the bonds secured by the general mortgage and the unpaid coupons on said bonds, inclusive of the coupons due from April 1st, 1888, with six per cent. interest from the maturity thereof in gold coin of the United States, less whatever sums may be received by the general mortgage trustee as the holder of bonds secured by previous mortgages.

That bonds secured by the said first mortgage to the amount of five million eight hundred and thirty-eight thousand dollars
26 were issued; that bonds secured by the Western division
first mortgage to the amount of four million seven hundred and eighty-four thousand dollars were issued; that bonds secured by the Waco & Northwestern division to the amount of five hundred and sixty-seven thousand dollars were issued; that bonds secured by the income and indemnity mortgage to the amount of one million five hundred thousand dollars were issued, and under the general mortgage bonds to the amount of four million three hundred and twenty-five thousand dollars were issued; that the said decree fails to fix and the court fails to find the amount due from the said Houston & Texas Central Railroad Company under the said several mortgages due prior to the recording of the said decree, and fails to find the amounts of cash in the hands of the trustees belonging to and forming a part of sinking fund provided under general mortgage, and fails to fix the amounts due under the said mortgages after deducting the amounts of promissory notes representing the proceeds of sales of a large portion of lands made by

the receivers subject to the said mortgages, and fails to fix or deduct the amounts in the hands of the said receivers, and in no way fixes definitely the amount to be paid by the said company in order to prevent the sale of said property.

And in and by the decree it was provided that in default of making payment as therein directed within the said thirty days the equity of redemption of the said company and of all persons claiming under it since the execution of the said mortgages and of all parties to the suit shall be barred and
27 foreclosed, and the said mortgaged premises sold at public
auction under the direction of a special master commissioner, the said Charles Dillingham being appointed such master commissioner, who, as hereinafter alleged, was one of the directors of the Houston & Texas Central Railway Company (No. 1).

That in and by the said decree the only default found to exist was the failure to pay the interest upon the bonds from the dates set forth in the decree, and no fact was found or stated or testimony heard showing a default in the payment of the principal of the bonds, which, as hereinbefore set forth, was not due.

The decree further provided that the said special master commissioner, on default being made in paying and redeeming the said railway company from the lien of mortgages as therein provided, shall sell the said railway, but it in no way provides, in accordance with the conditions of the said mortgage as herein set forth, for the sale, first, of the said land grants included and covered by the said respective mortgages before the railway itself be sold or offered for sale, but, on the contrary, provides that the special master commissioner shall offer for sale all the property, privileges, immunities, and franchises of every kind and description covered by the main line first mortgage and Western division first mortgage as one parcel and as an entirety, fixing as a minimum upset bid the sum of ten million five hundred thousand dollars; that he then offer for sale all of the property of every kind and description covered by the main line and Western division consolidated mortgages
28 which are not subject to either the main line first mortgage
of the Western division first mortgages; that he next offer for sale all of the property, privileges, immunities, and franchises covered by the Waco & Northwestern division first mortgage as one parcel and as an entirety, subject to the first mortgage on the property dated June 16th, 1873; that he next offer all of the property covered by the Waco & Northwestern consolidated mortgage as one

parcel and as an entirety, which are not subject to the Waco & Northwestern first mortgage; that he next offer the property covered by the income and indemnity mortgage and the general mortgage not covered by the main line first mortgage, the Western division first mortgage, and the Waco division first mortgage, the main line and Western division consolidated or the Waco division consolidated mortgages; and that after having so offered the properties the said special master commissioner shall offer as one parcel and as an entirety the whole of the properties of every sort and description of the said Houston & Texas Central Railway Company, with the exception of the railway land grants and property subject to the first mortgage on the Waco & Northwestern division, and if the highest bid received by him for the whole of the said property exceeds the aggregate amount of the several highest bids for the several portions of the said property, then the whole shall be sold as an entirety to the person making the highest bid; and it was further provided in and by the said decree that within twenty
29 days from the confirmation of the said sale the purchaser
shall deposit the amount of his or their respective bids in the Central Trust Company in the city of New York to the credit of the master commissioner, which said trust company was in and by the said plan of reorganization appointed the purchasing trustee, as hereinbefore set forth. Your orators beg to refer to said decree on file with the clerk of this court.

Accordingly the said property was offered for sale under the said decree and sold, on the 8th of September following the entry of the decree, to Frederic P. Olcott, the president of the Central Trust Company, for the sum of ten million five hundred and eighty thousand dollars, which included in the one bid and purchase all the property of the said railway, including all its franchises and all its land grants, covering four million three hundred and forty thousand three hundred and thirty-nine acres, excepting the Waco & Northwestern division, which was sold to George E. Downs, who made the said purchase through his attorney, Ernest B. Kruttschnitt, who was one of the attorneys of the Southern Development Company in said suit against the Houston & Texas Central Railroad Company, hereinbefore referred to. The said latter sale included in the one bid and purchase all the property of said division, including all its franchises and land grants, covering two hundred and seventy seven thousand two hundred acres; that the said purchase was made in pursuance of the said plan of reorganization hereinbefore referred to.

That the said Central Trust Company was, as aforesaid, in
30 and by the said plan of reorganization, trustee of the fund and
the purchasing committee to assist in carrying out said plan
of reorganization, and by its acts and proceedings made itself a party
to the proceedings and submitted itself to the jurisdiction of this
court in regard to the premises, and the said Olcott & Downs, by
purchasing at the said sale under the said decree of this court, became
parties to the said suit and submitted themselves to the jurisdiction
of this court in reference to the subject-matter of the said
suit, as your orators aver on information and belief.

9. Complainants further allege that, as they are advised and believe
and charge, the said decree was and is absolutely invalid and
void and beyond the power of the court to grant; that there was
no foundation for said decree or jurisdiction in the court to award
it, and that the same was entered by consent and agreement and
without any investigation or adjudication by the court, but was the
result of agreement simply and was procured, as complainants
allege on information and belief, by collusion, and was and is
fraudulent and part of the scheme to acquire possession of the road
in the interest of said Huntington and the said Southern Pacific
Company without regard to the rights or interests of the holders of
the stock of the said company No. 1 and in direct disregard of the
provisions and terms of the mortgages; that the defenses interposed
that the principal of the mortgages had not become due and
31 that the said railway could not be sold without a sale first of
the lands and the other defenses interposed were substantially
abandoned and withdrawn as a part of the said scheme herein
referred to; that the said defenses were never submitted to the court
for adjudication or determination, nor was evidence heard or offered
to sustain the same, but the decree was the result of the agreement
which the bondholders had made with the said Southern Pacific
Company and Central Trust Company, and the rights of the stockholders
were not considered or protected by any of the parties to the
record in said cause nor submitted to the court for adjudication or
investigation.

Complainants further allege that, as they are advised and believe, the said decree is void for the further reason that there was and is in the said decree no finding by the court fixing the amount due from the Houston & Texas Central Railway Company (No. 1) under the said several mortgages at and prior to the recording of the said decree and fixing the amount which the said company was required to pay to redeem its franchises, property and rights from the lien of the said mortgages, nor was there nor has there been any judicial inquiry into that matter, and that the said decree contradicts the provisions of the several mortgages set up in the bills asking foreclosure, and is non-judicial and void.

That with the purchase of the said main line and divisions sold as aforesaid to the said Frederic P. Olcott for $10.580.00 there 32 *was* included the land grants hereinbefore referred to, amounting to 4,340,339 acres, exclusive of the lands pertaining to the railways themselves, and included in the sale of the Waco & Northwestern division, sold to George E. Downs for $25,000, were land grants estimated at about 277,200 acres, exclusive of the lands pertaining to the railway, in all aggregating 4,617,539 acres; that, as hereinbefore shown, no provision was made in the decree for the sale of the lands before the road itself was offered for sale or sold as provided by the mortgage; but after the railroad had been sold under the said decree to the said Olcott and Downs an application was made on behalf of said purchasers to relieve Easton and Rintoul from further duties as receivers, and to permit the remaining receiver, Dillingham, to sell certain of the lands for and on account of the said Olcott & Downs, it being presented to the court by the said petitioners that it is likely delay will elapse in the interval between the confirmation of the sale and the final delivery of the property; that said petition was granted, and thereupon and in the month of October, 1889, 56,000 acres of land in Jasper and Newton counties were sold at $5 an acre, making a total of $280,000 realized from that sale alone.

10. Complainants further allege that on acquiring the possession of the said railway under the said foreclosure sale the said Huntington and his associates filed articles of incorporation under the laws of the State of Texas, organizing and incorporating a railway 33 company known as the Houston & Texas Central Railway Company (which is herein designated as No. 2), taking the same title and name as the corporation of which the complainants are stockholders for the purpose of operating the said railway and its franchise claimed by them to have been purchased and acquired at the said foreclosure sale, and thereupon and on or about the 1st of September, 1889, issued a notice to the stockholders of the said Houston & Texas Central Railway Company (No. 1), including these complainants, that they could participate in and become entitled to an equal number of shares of the said Houston & Texas Central

Railway Company (No. 2) as may be held by them in company No. 1, provided they pay an assessment of seventy-three dollars upon each share of stock held by them. In 1883, the year in which Huntington and his syndicate obtained possession of the said company No. 1, its stock, as hereinbefore alleged, sold at 82 and ½, and since 1884 it has never been above 51, but, on the contrary, it has been continually declining, and on the announcement of the said assessment of seventy-three dollars per share the market value of the stock fell to one dollar per share, becoming substantially valueless.

That during the period the said Houston & Texas Central Railway Company No. 1 was operated and managed by the receivers appointed by the court sufficient moneys were realized to pay the expense of operating the road and of all needful and necessary repairs, resulting in a profit which enabled said receivers to pay over one million dollars interest on its bonded indebtedness, as
34 complainants allege on information and belief. The exact amount complainants are not able to state and is not recited or ascertained by the said decree procured and entered as aforesaid.

That the said railway is a very valuable piece of property and the interest of the stockholders therein of great value, and complainants verily believe that if the said railroad was operated with a view to the interest of the stockholders the interest due upon the bonds might be paid and the road made very valuable; that the entire floating indebtedness of the company, complainants allege upon information and belief, does not exceed $2,446,676.77 (exclusive of bonus and interest mentioned in the reorganization agreement), notwithstanding which an assessment of seventy-three dollars per share was made, and of this floating indebtedness said Morgan's Louisiana & Texas Railway & Steamship Co. claims to be entitled to receive $1,702,364.14.

That said assessment was made unnecessarily high and, as complainants verily believe and charge, in bad faith by the said Huntington and his associates to bar out the present stockholders and to enable, under the said plan of reorganization, the Southern Pacific Company to acquire the entire stock on the payment simply of the amount required to be paid to the first-mortgage bondholders for interest and bonus and the expenses of the reorganization.

11. That, resting in the belief that the interests of the stock-
35 holders in said company No. 1 would be properly protected and secured in the legal proceedings, and that proper defenses would be interposed and litigated in good faith, and that no collu-

sive judgments would be entered, and that if there was to be any reorganization it would be on a basis fair, just, and equitable to all interested, these complainants were lulled into inactivity, so that they caused no investigation to be made into the manner in which said litigations were conducted until the complainants and other stockholders were notified that to acquire stock in the new or reorganized company they would be required to pay the unprecedented assessment of seventy-three dollars per share on the amount of stock held by them in the said company No. 1. It was not until thereafter that these complainants caused an investigation to be made, and for the first time ascertained the method in which the said Huntington and his associates acquired the said road and the nature of the decree procured by them and the total disregard and violation of the rights of the stockholders of the company by the directors thereof; that complainants were not parties to said consolidated cause or any of the other suits, and the fact of the entry of said decree and its terms became known to the complainants only recently.

12. That the said Houston & Texas Central Railway Company No. 2 is capitalized to the amount of ten million dollars, and it is intended to issue the said mortgage bonds referred to in the said plan of reorganization and place the same upon the market,
36 wherefore immediate action by the equitable interposition of a court of equity is absolutely essential, for the protection of the rights of the complainants and other stockholders, to prevent the said bonds reaching the hands of innocent holders; that the said bonds are all ready to be issued, as complainants allege on information and belief, and are only waiting formal authorization at a meeting called or to be called.

13. That at the time of the said sale the said railway was operated as aforesaid by the said Charles Dillingham and said Easton and Rintoul, as the receivers appointed in the said consolidated cause, and the board of directors of the said company last elected consisted of the defendants Collis P. Huntington, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, Charles Dillingham, J. J. Atkinson, A. H. Swanson, E. W. Cave, and Charles Fowler, of which A. C. Hutchinson was elected president.

That the said directors acted and are acting with and in the interest of the said Huntington and his syndicate and the said Southern Pacific Company and have interests inimical to those of the complainants and other stockholders similarly situated; that the said Collis P. Huntington, as hereinbefore stated, is vice-president of

the Southern Pacific Company, the said Isaac E. Gates is the acting vice-president, and the said Dillingham one of the receivers hereinbefore referred to and the special master commissioner conducting the sale; the said A. C. Hutchinson is the vice-president of the Galveston, Harrisburg & San Antonio railway, of which the said
37 Huntington is president, and which is one of the proprietary
lines of the said Pacific Company; the said J. G. Schriever is the vice-president of the Morgan's Louisiana & Texas Railroad & Steamship Co. and a director jointly with the said Huntington, and which road, as hereinbefore set forth, is one of the proprietary lines of the said Southern Pacific Co., that the said E. W. Cave is a member of the board of directors of the Texas & New Orleans railroad, of which the said Huntington is president, and which is one of the proprietary lines of the Southern Pacific Company.

That heretofore an action was commenced on behalf of certain stockholders in the supreme court of the State of New York against the said Huntington, his associates and others, and the said Houston & Texas Central Railway Company No. 1; that in the complaint in said action, of which a copy was duly served upon said Huntington in his individual capacity and also as a director of the said coporation, the facts herein averred were set forth at length and notice given thereby to the directors and those in control of said corporation of the wrong, substantially as charged in this bill, and by the said suit of the directors were notified to correct the said grievances complained of and to that end take such steps as might be proper to vacate and set aside the decree in said consolidated cause No. 198 or appeal therefrom or take such action in connection therewith as might be meet and proper for the protection of the rights of the stockholders; but the said Huntington and others
38 disputed the rights of the stockholders in the premises, and
said Huntington and his associates caused answers to be interposed in said suit by the purchasing trustee, the Central Trust Company, and the said Olcott and others, by counsel, and in their answers contended that the said decree was valid and binding upon all the stockholders of the said corporation, and assumed a position antagonistic and inimical to that taken by the plaintiffs in said action and by your orators in this, and urged the right of the said Houston & Texas Central Railway Company to mortgage the road, as they threaten to do.

That the said Dillingham was, as aforesaid, one of the board of directors, but who, as hereinbefore set forth, permitted the entry of the said decree and suffered the said company No. 1 to be disposed of as herein charged; that any notice to said board of directors or any of them to institute suit or proceed to vacate the said decree and sale or appeal therefrom would be a futile formality and of no avail whatever, and any notice given to commence suit would only result, as complainants verily believe and charge, in the said Huntington and his associates executing and recording the mortgages and issuing the bonds, to complainants' irreparable injury, and otherwise proceeding pursuant to their plan of reorganization in anticipation of any action which might be brought by complainants.

That the said directors and those who control the action of said corporation are acting for their own interests in a manner de-
structive of the company and of the rights of the other share-
39 holders, and your orators have made an earnest effort in good
faith to obtain redress at the hands of the directors and shareholders of the company; and your orators aver and state that this suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no jurisdiction.

14. That the defendants John S. Waters, Samuel W. Fields, A. W. Childress, R. B. Ascue, T. R. Price, Jr., N. W. Key, William J. Jardine, M. Early, John B. Haynie, Robert B. Hickman, Marshall H. Levy, Albert E. Jenkins, Thomas Maroney, T. H. Arnold, J. M. Kewley, John C. Greer, S. R. Baykin, Daniel A. Cabeen, Isaac B. Clark, Henry Malloy, Charles H. Bussey, Jerry O'Hare, Abraham Meyer, James Patten, William Brinn, J. M. Justice, Margaret Farris, John Butler Terrell, J. T. Bennett, James Carson, George A. Hill, Thomas M. Shirley, Charles L. Beisner, G. Mayhoff, Lizzie Lee, Alfred J. Barrager, Elizabeth Peregoy, Cyrus Smith, Michael Tierney, John J. Atkinson, Samuel Ayres, Robert Brewster and The Lone Star Land Company were defendants in the said consolidated cause commenced in this court, hereinbefore referred to, and they claim to have some lien or interest in the said Houston & Texas Central Railway Company No. 1 by way of money judgment or otherwise.

15. That this suit is brought by complainants in their own behalf
and for the benefit of all stockholders of the said Houston &
40 Texas Central Railway Company No. 1 similarly situated
and who may desire to come in and contribute to the expenses of this action and receive the benefits thereof.

All which actings, doings or pretences of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orators in the premises. In consideration whereof and forasmuch as your orators are entirely remediless in the said premises according to the strict rules of the common law and can only have redress in a court of equity, where matters of this nature are properly cognizable and relievable, to the end, therefore, that the said defendants and each of them may if they can, show why your orators should not have the relief hereby prayed for, and that they may separately and severally true, direct, and perfect answers, make (but not under oath their answers under oath being hereby expressly waived), according to the best of their knowledge and belief, to all and singular the matters and charges aforesaid, and that as fully in every respect as if the same were here repeated and they thereunto particularly interrogated, that the decree rendered by this court on the 4th day of May, 1888, in said consolidated cause No. 198, in the suit of Nelson S. Easton and James Rintoul, trustees, and the Farmers' Loan & Trust Company, as trustee, against The Houston & Texas Central Railway Company and others be vacated and set aside and adjudged and decreed to be fraudulent, collusive, illegal and void; that your orators may be permitted to intervene and become parties defendant in said suit and permitted to be heard and defend the same; that the sale of the railroad and the lands of the said Houston & 41 Texas Central Railway Company No. 1 under said decree to be vacated and set aside and the said railway and lands restored to the possession of the receivers appointed by this court or such other officer or receivers as the court may name; that the defendants, their and each of their servants, agents, attorneys, and employees, may, by writ of injunction issued out of and under the seal of this court, be enjoined and restrained during the pendency of this suit and thereafter perpetually from executing or delivering, filing, recording, registering, or causing, suffering, or permitting to be filed, recorded, or registered in any register's office, clerk's office, or prothonotory's office, any mortgage or deed of trust upon the property of the Houston & Texas Central Railway Company referred to in said decree and the subject matter of said consolidated cause, or otherwise encumbering or selling or disposing of or alienating the property or franchises of the said company, and from executing and delivering, selling, hypothecating, giving away, or in any manner or form issuing, alienating or parting with any shares of stock of the new or reoganized Houston & Texas Central Railway Co. (No. 2), or

any bond or bonds secured by mortgage, upon the property claimed to be possessed by the Houston & Texas Central Railway Co. (No. 2), or any of the stock or bonds issued or intended so to be pursuant to the reorganization agreement between the mortgage bondholders of the said Houston & Texas Central Railway Co. (No. 1) and the Southern Pacific Company and the Central Trust Company of the city of New York, dated December 20th, 1887, and that
42 your orators may have such other or further relief in the premises as the circumstances of the case may require and as may be according to equity, and especially for a restraining order until a hearing upon this bill for injunction can be had.

May it please your honors to grant unto your orators the writ of subpœena of the United States of America, issuing out of and under the seal of this honorable court, to be directed to the defendants, The Houston & Texas Central Railway Company (No. 1), The Houston & Texas Central Railway Company (No. 2), The Central Trust Company of the City of New York, The Farmers' Loan & Trust Company of the City of New York as trustee, Nelson S. Easton and James Rintoul as trustees, Benjamin A. Shepherd, surviving trustee; Frederic P. Olcott, George E. Downs, The Southern Pacific Company, Nelson S. Easton, Charles Dillingham and James Rintoul as receivers, Collis P. Huntington and Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E. W. Cave, Charles Dillingham, J. J. Atkinson, A. H. Swanson, Charles Fowler, John S. Waters, Samuel W. Fields, A. W. Childress, R. B. Ascue, T. R. Pierce, Jr., William J. Jardine, M. Early, John B. Haynie, Robert B. Hickman, Marshal H. Levy, Albert E. Jenkins, Thomas Maroney, T. H. Arnold, J. M. Kewley, John C. Greer, S. R. Baykin, Daniel A. Cabeen, Isaac B. Clark, Henry Malloy, Charles H. Bussey, Jerry O'Hare, Abraham Meyer, James Patten, William Brinn, J. M. Justice, Margaret Farris, John Butler Terrell, J. T. Bennett, James Carson, George A. Hill, Thomas M. Shirley, Charles L. Beisner, G. Mayhoff, Lizzie
43 Lee, Alfred J. Barrager, Elizabeth Peregoy, Cyrus Smith, Michael Tierney, John J. Atkinson, Samuel Ayres, Robert Brewster, and The Lone Star Land Company, each of them to appear and answer this bill; and your orators will pray, etc.

R. H. LANDALE,
Solicitor for Complainants.

CLARK, DYER & BOLINGER AND
JEFFERSON CHANDLER,
Of Counsel.

UNITED STATES OF AMERICA, } *ss.* :
Southern District of New York, }

Warren S. Sillcocks, being duly sworn, deposes and says: I am one of the complainants herein who are united in interest. I know the contentes of the foregoing bill of complaint; the same are true of my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be trus.

WARREN S. SILLCOCKS.

Sworn to before me this 14th day of December, 1889.
[SEAL.] WILLIAM WETTERER,
Notary Public, N. Y. Co.

44 Endorsed: "No. 228. Equity. United States circuit court, eastern district of Texas, fifth circuit. S. W. Carey *et al.* against Houston & Texas Central Railroad Company *et al.* Original bill of complaint. R. H. Landale, solicitor for complainants. Filed December 23, 1889. C. Dart, clerk."

94 In the Circuit Court of the United States for the Eastern District of Texas.

Amended Bill of Complaint.

To the judges of the circuit court of the United States for the eastern district of Texas, sitting in equity :

S. W. Carey, a citizen and resident of the State of New Jersey ; Warren S. Sillcocks, a citizen and resident of the State of New York ; J. Van Schaick, a citizen and resident of the State of New York ; D. P. Ingraham, Jr., a citizen and resident of the State of New York ; James Landale, a citizen of Great Britain ; George Wilson, a citizen of Great Britain, and Andrew S. McClelland, a citizen of Great Britain, in their own behalf and in behalf of all others similarly situated, bring this their amended bill of complaint

against

The Houston & Texas Central Railway Company (No. 1), a corporation created by and existing under the laws of the State of Texas and a citizen of the said State, having its main office and domicil in the city of Houston, county of Harris, within the eastern district and State of Texas ; the Houston and Texas Central Railroad Company (No. 2), a corporation created by and existing under the laws of the State of Texas and citizen of the State of Texas, having its office and domicil within the eastern district and State of Texas ; The Central Trust Company of the City of New York, a corporation existing under and by virtue of the laws of the State of New York, and a citizen of said State ; The Farmers' Loan and Trust Company of the City of New 95 York, as trustee, a corporation existing under and by virtue of the laws of the State of New York, and a citizen of said State ; Nelson S. Easton and James Rintoul, as trustees, who are respectively residents and citizens of the State of New York ; Benjamin A. Shepherd, surviving trustee, a resident of the city of Houston and State of Texas and a citizen of said State ; Frederick P. Olcott, George E. Downs, who are respectively residents and citizens of the State of New York ; The Southern Pacific Company, a corporation organized under and by virtue of the laws of the State of Kentucky and a citizen of said State ; Nelson S. Easton, Charles Dillingham and James Rintoul, as receivers, the said Charles Dillingham being a resident and a citizen of the

State of Louisiana, and the said Easton and Rintoul residents and citizens of the State of New York; Collis P. Huntington and Isaac E. Gates, respectively residents and citizens of the State of New York; J. G. Schriever, a resident and citizen of the State of Louisiana; A. C. Hitchinson, a resident and citizen of the State of Louisiana; E. W. Cave, a resident and citizen of the State of Texas; Charles Dillingham, a resident and citizen of the State of Louisiana; J. J. Atkinson, a resident and citizen of the State of Texas; A. H. Swanson, a resident and citizen of the State of Texas; Charles Fowler, a resident and citizen of the State of Texas; John S. Waters, Samuel W. Fields, A. W. Childress, R. B. Ascue, T. R. Pierce, Jr., William J. Jardine, M. Early, John B. Haynie, Robert B. Hickman, Marshal H. Levy, Albert E. Jenkins, Thomas Maroney, T. H. Arnold, J. M. Kewley, John C. Greer, S. R. Baykin, Daniel A. Cabeen, Isaac B. Clark, Henry Malloy, Charles A. Bussey, Jerry O'Hara, Abraham Meyer, James Patten, William Brinn, J. M. Justice, Margaret Farris, John Butler Terrell, J. T. Bennet, James Carson, George A. Hill, Thomas 96 M. Shirley, Charles L. Beissner, G. Mayhoff, Lizzie Lee, Alfred J. Barrager, Elizabeth Peregoy, Cyrus Smith, Michael Tierney, John J. Atkinson, Samuel Ayres, Robert Brewster, who are respectively residents and citizens of the State of Texas, within the eastern district and State of Texas, and the Lone Star Land Company, a corporation organized and existing under the laws of the State of Texas and a citizen of said State, having its office within the eastern district and State of Texas.

And thereupon your orators complain and say that one of them, S. W. Carey, is a citizen and resident of the State of New Jersey; that others, to wit, Warren S. Sillcocks, J. Van Schaick, and D. P. Ingraham, Jr., are citizens and residents of the State of New York, and that others of them, to wit, James Landale, George Wilson, and Andrew S. McClelland, are citizens of Great Britain, and that the defendant The Houston & Texas Central Railway Company (which for convenience and for the purpose of designating the same is hereinafter called No. 1) was and is a corporation duly organized and existing under the laws of the State of Texas and engaged in the operation of a railroad in said State, having its main office and domicil in the city of Houston and county of Harris and within the eastern district and State of Texas.

That the said company was originally created and first known as

the Galveston and Red River Railroad Company, created by an act of the legislature of the State of Texas entitled "An act to establish the Galveston and Red River Railroad Company, approved March 11th, 1848," and acts of the legislature of the said State supplemental thereto and amendatory thereof, including an act of the legislature of
that State entitled "An act amendatory of and supplemental to
97 'An act to establish the Galveston and Red River Railroad
Company and several acts supplemental thereto,'" passed September 1st, 1856, and duly approved, in and by which latter act the name of the company was changed and declared to be the Houston & Texas Central Railway Company, and was invested with the right of making, owning, and maintaining a railway from Galveston bay or its contiguous waters to the Red river.

Thereafter and by an act passed May 24th, 1873, by the legislature of the State of Texas the Waco & Northwestern Railroad Company, a duly organized corporation, was, with all its privileges, franchises, rights, and properties, merged in the Houston & Texas Central Railway Company and became a part thereof.

That at the times of the grievances hereinafter mentioned the said company No. 1 owned, possessed, and operated by authority of law the following lines of railway, namely:

(*a.*) A line from Houston to Denison, a distance of about three hundred and forty-five miles, commonly known as the main line.

(*b.*) A line from the main line at Hempstead to Austin, a distance of about one hundred and eighteen and three-fourths miles, commonly known as the Western division.

(*c.*) A line from the main line at Bremond to Ross, a distance of about fifty-seven miles, commonly known as the Waco and Northwestern division.

That in addition the said company No. 1, by various statutes of the State of Texas, for the purpose of aiding in the construction and equipment of the said railway, received from the said State of Texas sixteen sections or square miles of the public domain of said State, equal to 10,240 acres of land, for each mile of its road built and for each mile thereof that would be built in the future as the same should be built.

98 2. That complainants are stockholders of the Houston & Texas Central Railway Company, and many of them, to wit, S. W. Carey, Warren S. Sillcocks, J. Van Schaick, D. P. Ingraham, Jr., and George Wilson, have been such for many years, having purchased shares in the capital stock of said corporation at

different times prior to the transactions and grievances hereinafter complained of, and complainants further state that the stock held and owned by your orators amounts in value to a large sum, to wit, $500,000, that being the par value of the 5,000 shares held and owned by them.

3. The said company, on or about the times of their respective dates, executed the following mortgages or deeds of trust:

(*a.*) A mortgage or deed of trust commonly called the main line first mortgage, dated July 1st, 1866. This mortgage was executed to Shepherd Knapp and David S. Dodge, as trustees, who, however, were subsequently superseded by the defendants Nelson S. Easton and James Rintoul, both of whom qualified and entered upon the discharge of their duties as such. The said mortgage was given to secure the payment of a series of first-mortgage bonds for one thousand dollars each, bearing even date with the said mortgage, to be issued at the rate of not exceeding $20,000 per mile of railway then built and thereafter to be built over the route of its said main line, payable on July 1st, 1891, with interest at seven per cent. per annum, payable semi-annually, on the 1st days of July and January in each year, until the principal should be fully paid and satisfied. This mortgage covered the main line, commencing at the city of Houston and extending to the Red river, in said State of Texas, and also all and singular ten sections or square miles of land for each mile of said main line of railway then built and thereafter to be built, equal to 6,400 acres of land for each mile.

99 (*b.*) A mortgage or deed of trust commonly known as the Western division first mortgage or deed of trust, dated December 21st, 1870, executed to Shepherd Knapp and William Walter Phelps as trustees, who, however, were subsequently superseded by the said defendants, Easton and Rintoul, both of whom qualified and entered upon the discharge of their duties as such. The said mortgage was given to secure the payment of a certain series of first-mortgage bonds for one thousand dollars each, bearing even date with said mortgage or deed of trust, to be issued at the rate of not exceeding twenty thousand dollars per mile of railway then built and thereafter to be built over the route of its said Western division, and payable on July 1st, 1891, with interest at seven per cent. per annum, payable semi-annually, on the first days of July and January in each year, until the principal shall be fully paid and satisfied. This mortgage covered the said Western division of the said railway, commencing at a point on the main line in the city of Hempstead,

in Austin county, and extending to the city of Austin, Travis county, in the State of Texas, and also embraced all and singular the ten sections or square miles of land for each mile of the said Western division of the said railway then built and thereafter to be built.

(*c.*) A mortgage or deed of trust commonly known as the Waco & Northwestern division first mortgage, dated June 16th, 1873, executed to the defendant The Farmer's Loan and Trust Company of the City of New York, as trustee, which was at the said time and still is a corporation organized and existing under the laws of the State of New York, having its principal place of business in the city of New York. The said mortgage covered the said Waco and Northwestern division of the said railway, and also six thousand acres of land per mile of road completed.

90*a* (*d.*) A mortgage or deed of trust commonly known as the main line and Western division consolidated mortgage, dated October 1st, 1872. This mortgage was executed to the said defendant, The Farmers' Loan & Trust Company, as trustee, and was given to secure the payment of a second series of first consolidated mortgage bonds for one thousand dollars each, bearing even date with said mortgage or deed of trust, to be issued to the extent of fourteen millions of dollars, but in no case to exceed in the aggregate thirty thousand dollars per mile of road under that or any previous issue, payable in October, 1912, with interest at eight per cent. per annum, payable semi-annually, in October and April of each year, until the principal shall be fully paid and satisfied, which said mortgage covered and embraced the main line of said railway, extending from the city of Houston, in Harris county, through the counties of Grimes, Brazos, Robertson, Limestone, Navarro, Ellis, Dallas, Collins, and Grayson, to the Red river, on the northern boundary of the said State, and also all the line of the Western division of the said railway, extending from the city of Hempstead, in Washington county, through the county of Bastrop, to the city of Austin, Travis county, together with several sections of square miles of land, being three thousand eight hundred and forty acres per mile of road completed, upon the said main line and Western division consolidated mortgage.

(*e.*) A mortgage or deed of trust commonly known as the Waco and Northwestern division consolidated mortgage, dated May 1st, 1875, and was executed to the Farmers' Loan and Trust Co., as trustee, and was given to secure the payment

of a series of its consolidated mortgage bonds, to be issued to the extent of ten thousand dollars per mile of road completed of
91*a* the said Waco & Northwestern division, in addition to the twenty thousand dollars per mile of bonds, payment of which was secured by the said Waco and Northwestern division first mortgage, which said bonds were of even date with the said mortgage or deed of trust and payable May 1st, 1915, with interest at eight per cent. per annum, payable semi-annually, on the first days of May and November in each year, until the principal shall be fully paid and satisfied, the said mortgage embracing and covering the railway of the company known as the Waco and Northwestern division, then built and to be built, beginning at a point on the main line of said railroad in the town of Bremond, Robertson county, passing through the city of Waco, in McLennan county, to the Red river, and thence to the northern boundary line of said State, including also and covering six thousand acres of land per mile of completed road of the said division.

(f.) A mortgage or deed of trust dated May 7th, 1877, commonly known as the income and indemnity mortgage, executed to Thomas W. House and the defendant Benjamin A. Shepherd, as trustees. Subsequently and prior to the commencement of this action the said House departed this life, leaving the said Benjamin A. Shepherd as sole acting trustee. The said mortgage was given to secure the payment of a series of income and indemnity mortgage bonds aggregating one million five hundred thousand dollars, bearing even date with the said mortgage payable May 1st, 1887, with interest at seven per cent. per annum, — on the first days of July and January of each year until the principal shall be fully paid and satisfied, the said mortgage covering the railway of the said defendant, The Houston and Texas Central Railway Company (No. 1), then completed, namely, from Houston to the Red river, from Hemp-
92*a* stead to Austin, from Bremond to Waco, and ten miles completed of the Waco and Northwestern division beyond Waco, and also all the lands and land grants acquired and received and to which *to* said company was entitled to from the said the State of Texas for the construction of its said railway.

(g.) Subsequently to the execution of the said mortgages and on or about the first day of April, 1881, the said company executed another mortgage or deed of trust, dated on the said day, to the defendant The Farmers' Loan and Trust Company, as trustee, known and herein referred to as the general mortgage, covering all and singular all of the railways of the said company and all its franchises, being in the aggregate about five hundred and twenty and three-fourths miles of railway in active operation, including all its real and personal property then acquired or which immediately thereafter should be acquired in the State of Texas, and all and singular the several sixteen sections or square miles or ten thousand two hundred and forty acres of land per mile for each mile of completed road on its main line from Houston to the Red river, and on its branch line from Hempstead to the city of Austin, and on its branch line from Bremond to Ross, granted by the State of Texas to aid the said railroad, and all its town lots acquired by gift, purchase, or otherwise. The said mortgage was executed to the said trust company to secure the payment of a series of its general mortgage bonds to the amount of eighteen million five hundred thousand dollars; all of which were dated April 1st, 1881, and were for the sum of one thousand dollars each, and made payable April 1st, 1921, with interest at the rate of six per cent. per annum, to be paid semi-annually on the first days of October and April in each year until the principal should be fully paid and satisfied.

93*a* That the said general mortgage was executed to the said trustees in trust for the uses and purposes therein mentioned, one of which being that the sum of sixteen million eight hundred and twenty-three thousand dollars of said bonds should be reserved by the trustees, and not issued except for the purpose of exchanging and retiring the bonds then outstanding issued by the railway company, and the payment of which bonds was secured by lien upon some portion of its railway and property, and specified as follows:

Amount due the State of Texas for loans from the school fund	$300,000 00
First-mortgage main line bonds	6,262,000 00
First-mortgage Western division bonds	2,270,000 00
First-mortgage Waco and Northwestern division bonds	1,140,000 00
Main line and Western division second-mortgage bonds	4,784,000 00
Waco and Northwestern division second-mortgage bonds	567,000 00
Income and indemnity mortgage bonds	1,500,000 00
Total	$16,823,000 00

The balance of the said bonds aggregating one million six hundred and seventy-seven thousand dollars, the trustees were directed to sign and deliver to the railroad company, to be used by the management in retiring the floating debt and for the improvement, equipment and betterment of the road; that in and by the said general mortgage it was provided, as hereinbefore stated, that the entire income and indemnity mortgage bonds should be retired and exchanged for bonds of an equal amount secured by the said general mortgage.

That according to the provisions of the said general mort-
94*a* gage or deed of trust the said trustees did accordingly receive, pay, retire and exchange, prior to the institution of the proceedings and actions hereinafter mentioned, all of the said income and indemnity mortgage bonds, excepting one bond for five hundred dollars, and issued in the place and stead thereof the general mortgage bonds, equal in amount to one million four hundred and ninety-nine thousand five hundred dollars, payable April 1st, 1921, with interest at the rate of six per cent. per annum, which was accepted and received by the holders of the income and indemnity mortgage bonds in exchange and payment of the said bonds.

4. Complainants further allege on information and belief that in and prior to the year 1883 a majority of the stock of the Houston and Texas Central Railway and a controlling interest in the company was owned by a corporation created and existing under the laws of the State of Louisiana, known as Morgan's Louisiana and Texas Railroad & Steamship Company, and in the early part of the year of 1883 the defendant Collis P. Huntington, who was, as complainants allege on information and belief, interested in and a large stockholder of the Southern Development Company (a corporation organized under the laws of the State of California) and who with his associates controlled the same, formed a syndicate with his associates for the purpose of acquiring in his own interest and that of the Southern Development Company the control of the said Houston & Texas Central Railway Co.; that accordingly the said Huntington and his said associates acquired by purchase in the early part of the said year the stock and controlling interest in the said Morgan's Louisiana & Texas Railroad & Steamship Co., by means of which ownership of the said stock of the said Morgan's Louisiana &
Texas Railroad and Steamship Co. said Huntington and his
95*a* associates were able to do and did control said company and

to guide and prescribe its voice and vote in respect of the stock of the said Houston & Texas Central Railway Company and to name and elect the officers and directors thereof, which they thereupon did, thus obtaining control of said last-named company.

Complainants further allege on information and belief that in 1884 the Southern Pacific Company was chartered under the laws of the State of Kentucky, of which company the said Huntington was and is vice-president and with his said associates owns a majority and controlling interest therein; that the latter company acquired the interest of the said Southern Development Company in Morgan's Louisiana & Texas Railroad & Steamship Company, by reason whereof they were able to and have controlled the Houston & Texas Central Railway Company and to name and elect its officers and directors, which they have done; that the said Southern Pacific Company was interested in connecting roads in conjunction with which it was desired that the Houston and Texas Central railway should be operated.

That at said time the said Houston & Texas Central railway was the oldest and most reliable railway in the State of Texas and owned valuable land grants from the State of Texas, which amounted at that time, as complainants allege on information and belief, to about five million five hundred thousand acres.

After the said syndicate obtained control of the Houston & Texas Central railway the stock immediately commenced to depreciate and continued to depreciate until, through the acts, suits, and proceedings hereinafter more fully referred to, all rights of the holders
of the stock of the said company were sought and attempted
96*a* to be effectually shut out and barred and the absolute con-
trol of the company acquired by said syndicate, so that the railway might be run solely in the interest of the said syndicate and the said Southern Pacific Company.

That prior to 1883, at which time said Huntington and his associates obtained control of the Houston & Texas Central Railway Company, the stock of said company was quoted and sold as high as one hundred and two dollars per share, and in many instances your complainants paid nearly par for the stock purchased by them.

When the said syndicate acquired a controlling interest in said railway its stock fell and was quoted and sold in the market at 88½ per share; in 1884 it was sold at 51; in 1885 at 39¼; in 1886 at 41; in 1887 at 45; in 1888 at 23; in 1889 at 13⅛, and on the announcement of the assessment hereinafter mentioned the market value of the stock fell to one dollar a share and became thus practically valueless.

That in January, 1885, when the holders of the first mortgage bonds (main line and branches) presented their coupons for payment it was fraudulently and wrongfully contrived by said Huntington and his associates that said coupons were cashed and secretly taken up by the Southern Development Company without notice to the holders thereof; that thereupon and in the same month of January, 1885, the Southern Development Company commenced a suit against the Houston and Texas Central Railway Co. (No. 1) in this court, claiming that said railway company was indebted to the Southern Development Co. in the sum of six hundred thousand dollars for money loaned and advanced at various times during the preceding six years to take up coupons and for other purposes, and on the 20th day of February, 1885, the appointment of re-
97*a* ceivers was procured in said action, to wit, Charles Dillingham, one of the directors of the Houston and—Central Railway Company and Benjamin G. Clarke. The said order appointing the receivers was made with the consent of the said railway company No. 1, through its solicitors. On the 21st day of January, 1886, the defendants Easton and Rintoul, trustees, filed two bills of complaint in this court for foreclosure, and subsequently, on the 20th of April, 1886, the Farmers' Loan and Trust Company filed a bill in this court, which said bills were described on the docket as Nos. 198, 199, and 201 respectively, and at the May Term, 1886, of this court, all the parties consenting, the causes were consolidated as No. 198.

During the said May term of the court the said suit of the Southern Development Co. was dismissed, as complainants are advised, and thereupon the said Nelson S. Easton, James Rintoul, and the said Charles Dillingham were appointed joint receivers of the said Houston and Texas Central Railway Co. in said consolidated cause, the said company through its counsel consenting to such appointment.

The said consolidated cause so prosecuted by the said trustees was founded and based substantially upon the default made in January, 1885, hereinbefore referred to, in the payment of the interest on the said bonds and the interest falling due thereafter. Neither the consolidated cause nor any one of the bills was founded upon or sought to secure the foreclosure of the mortgage known as the Waco & Northwestern division, dated

June 16th, 1873, and referred to in subdivision C of paragraph 3 of this complaint.

At the time of the commencement of the said suits, to wit, January and April, 1886, none of the bonds issued had matured and no part of the principal had become due; that the principal of the bonds secured by the main line first mortgage, referred to in 98a subdivision A of paragraph 3 of this complaint, will not mature until July 1st, 1891; that the bonds secured by the Western division first mortgage, referred to in subdivision B of said paragraph, will not mature until July 1st, 1891; that the bonds secured by the mortgage known as the main line and Western division consolidated mortgage, referrad to in subdivision D of said paragraph, will not mature until October, 1912; that the bonds secured by the mortgage commonly known as the Waco and Northwestern consolidated mortgage, referred to in subdivision E of said paragraph, will not mature until May 1st, 1915; that the bonds secured by the income and indemnity mortgage, referred to in subdivision F of said paragraph, did not mature until May, 1887, after the commencement of said suits; that said indemnity and income mortgage bonds, as hereinbefore set forth, were all retired and exchanged prior to the commencement of the said suits for the funds secured by the general mortgage which was made and executed April 1st, 1881 (excepting one of the bonds for five hundred dollars), and the said bonds secured by the general mortgage, referred to in subdivision G of said paragraph, will not mature until April 1st, 1921.

5. That in none of the said several mortgages is it provided that the failure to pay interest upon any of the bonds shall be taken to precipitate the maturity of the principal, nor do they provide for or permit the sale of the said railway prior to the maturity of the principal of the bonds referred to in the said respective mortgages or either of them.

6. That the main line first mortgage, upon which said bill No. 198 was founded and based, provided by its terms that if default be made in the payment of interest which should become due upon the said bonds the trustees, at the request of any bondholder, were 99a required to make a demand in writing on the president or secretary of the company for the payment of interest in arrears, and if the company made default for sixty days after said time the trustees were empowered to take possession of the road and use, operate, and work the same, and, after paying the expenses of running and operating the road and for needful and necessary

repairs, apply the net profits to the payment and discharge of the interest, when and whereupon the said railway, with its appurtenances, was to be surrendered and delivered back to the said railway company; and it was further provided that if default be made in the principal at maturity the trustees should proceed to sell the lands which were conveyed and which remained unsold, and if the proceeds of such sale should not be sufficient to pay off the said bonds and interest in full, then the trustees were directed at the end of six months from the time of the maturity of the bonds to sell the road to the highest bidder at public auction, to which mortgage referred to in the decree hereinafter mentioned complainants beg leave to refer and make part hereof.

The Western division first mortgage, upon which said Easton and Rintoul filed their bill No. 199, contains provisions substantially similar in all respects.

The general mortgage, executed April 1st, 1881, embraced in said consolidated cause, contains substantially similar provisions. The mortgages known as the main line and Western division consolidated mortgage and Waco & Northwestern division consolidated mortgage provides that in case the company failed to pay the principal or the interest upon bonds as they become due and for sixty days after demand the trustees were empowered to enter upon the
road, operate and manage the same, and, after paying taxes and
100 counsel fees and necessary expenses in connection with the
operation of the road and for proper repairs, apply the surplus
to the payment of interest or principal due and assume the management of the road until the principal and interest are paid or the property sold, as provided in the mortgage, but such sale was to be had only in case *of* default should be made in the principal sum of the bonds at maturity and proper proceedings were commenced to procure a decree of sale of said premises and property, which proceedings the trustees were required to commence at the request, in writing, of a majority of the holders of the bonds so in default.

7. Complainants further allege that the answer of the railroad company in said suits expressly placed in issue by denying that the principal sum of the said bonds had become due or demandable, and averred that the court was not authorized to set aside the terms and provisions of the deed of trust and decree the prinpal of the bonds issued under the said deed to be due when the same were not due until years after the filing of the bill, and that the court had no power to decree that the railways belong-

ing to the said Houston & Texas Central Railway Company should be sold prior to the maturity of the bonds or sold prior to the sale of all the lands covered by the said deeds of trust; and in the answer it was further averred that if the lands received by grants from the State of Texas were carefully administered and converted into money at a reasonable price by the railroad company or by the receivers the proceeds of the sale would so materially reduce the indebtedness of the company that it might reasonably hope to be able to pay the whole of its floating debt and the principal of its bonds upon the dates they become due.

101 8. Complainants further aver on information and belief that after the filing of the said answer and until after the making of the organization agreement, hereinafter referred to, no testimony was taken in the said suit; that while the suit was in that condition and on or about December 27th, 1887, an agreement was entered into, as complainants have since learned, by a majority of the holders of the mortgage bonds (with the possible exception of those upon the Waco & Northwestern division, as to which division a sufficient number of bondholders could not be brought into an agreement of reorganization) and the Southern Pacific Co. and the Central Trust Co. for the reorganization of the said Houston & Texas Central Railway Company, by the terms of which agreement a plan of reorganization was agreed upon between the parties to said instrument, by which they agreed to a foreclosure of the said mortgage, and by which it was further agreed that a new company should be organized which shall acquire all the property and franchises of the present company, designated herein as the Houston & Texas Central R'y Co. No. 1, and thereafter issue new bonds equal in amount to the principal of the outstanding consolidated mortgage and general mortgage bonds in the following proportions: The present holders of the first mortgage bonds were to receive new bonds in equal amount, and in addition to be paid the face value (without interest) of the unpaid coupons up to and including the coupons maturing July 1st, 1887, and also a bonus of fifty dollars in cash upon each bond; the interest upon the said bonds was to be guaranteed by the Southern Pacific Company. The holders of the consolidated mortgage bonds were to receive new bonds, with interest at the rate of six per cent., and in addition to receive debenture bonds, with interest, payable simi-annually, at the
rate of six per cent., for three-fourths of the face value (with-
102 out interest) of the unpaid coupons to and including those

maturing October 1st, 1887, both the principal and interest of the said debenture bonds to be guaranteed by the Southern Pacific Company. The holders of the general mortgage bonds, including nine hundred and forty-five bonds alleged to have been hypothecated with the Southern Development Company, Morgan's Louisana & Texas Railroad—Steamship Company, and the National City bank, to receive new bonds, bearing four per cent. interest, and in addition to receive debenture bonds, bearing interest, for two-thirds of the face value (without interest) of the unpaid coupons to and including the coupons maturing October 1st, 1887, both the principal and interest of the debenture bonds to be guaranteed by the Southern Pacific Company, and the interest upon the general mortgage bonds was also to be guaranteed by the Southern Pacific Company, and the new company was to issue stock in the sum of ten million dollars.

That though none of the stockholders of the company No. 1 as such were parties to the said agreement, it was in and by the said agreement or plan of reorganization provided that the present holders of the capital stock of the said Houston and Texas Central railway might, within a time to be prescribed by the Central Trust Company, receive, if they elect so to do, a share of the capital stock of the new company equal in proportion to the stock held by the said stockholders on paying a proportionate amount of the sums necessary to discharge the whole floating debt of the old company and the cash payments to be made under the said plan for interest and bonus and the necessary charges and expenses to be incurred in the said reorganization; that in said agreement it was further provided that in the event that any portion of the capital stock
103 should not be taken up by the said stockholders or holders of the floating debt, as provided in said agreement, then the Southern Pacific Company, on paying only the cash necessary to pay the interest and bonus to the holders of the first-mortgage bonds and coupons and other charges and expenses to be incurred in the said reorganization, were to be entitled to the capital stock of the new company not so taken up; that the said Central Trust Company was agreed upon as the purchasing trustee, with whom the bonds were to be deposited, and who was authorized to bid in and pay for the road on foreclosure and to carry out the proposed reorganization, a copy of which plan of reorganization is on file with the clerk of this court, and to which reference is hereby made.

That the negotiations in reference to the said plan of reorganization were had mainly, as complainant's have since learned, with the said Huntington, and many meetings to arrange the same were held at his office, as complainants allege upon information and belief, but as hereinbefore stated, none of the stockholders of said company No. 1—as such were parties to the said agreement were notified of or in any manner agreed or consented to the same.

9. After the execution of the said agreement or plan for reorganization by the said bondholders and in pursuance thereof and of the scheme mapped out, the complainants in said consolidated cause, during the May term of 1888 of this court, applied for and on consent procured to be entered a decree in the said consolidated cause, as complainants learned on examination of said record; that the only testimony in the cause were certain formal depositions of the trustees and others on behalf of the complainants taken after the making of said reorganization agreement, as complainants are informed and believe; to which depositions, on file with the
104 clerk of this court, complainants beg leave to refer; that, as
appears from the docket of the clerk, the depositions were filed May 3d, 1888, and publication made May 4th, 1888, though the cause is purported to have been submitted on May 3d, and the decree, which consisted of about one hundred and fifty folios, filed and entered May 4th; to which docket complainants beg leave to refer; but no testimony was taken or submitted on behalf of the defendants in said suit or to sustain the defenses interposed in the answer nor any evidence offered by the complainants or submitted to the court rebutting the defenses which were raised and presented by the pleadings.

That in and by said decree, procured as aforesaid by consent, it was ordered, adjudged and decreed that the Houston and Texas Central Railway Company (No. 1) on or before the expiration of thirty days from the date of said decree pay into court the following sums in addition to a sufficient sum to pay the costs of the cause:

(*a.*) The amount of the principal of the bonds secured by the main line first mortgage, with seven per cent. interest thereon from January 1st, 1888, inclusive of the coupons due January 1st, 1888, with six per cent. interest in gold and silver coin of the United States.

(*b.*) The amount of the principal of the bonds secured by the Western division first mortgage, with seven per cent. interest from January 1st, 1888, and the amount of the unpaid coupons, inclusive of coupon due January 1st, 1888, with six per cent. interest in gold and silver coin of the United States.

(*c.*) The principal of the bonds secured by the main line and Western division consolidated mortgage, with eight per cent. interest thereon from April 1st, 1888, and the amount of due and unpaid coupons, inclusive of the coupons due April 1st, 1888, with six per cent. interest.

105 (*d.*) The principal of the bonds and unpaid coupons secured by the Waco & Northwestern division consolidated mortgage, with interest at eight per cent. from May 1st, 1888, inclusive of the coupons due May 1st, 1888, with six per cent. interest.

(*e.*) The amount of the principal and unpaid coupons secured by the income and indemnity mortgage, with seven per cent. interest, inclusive of the coupons due May 1st, 1887, with eight per cent. interest from the maturity thereof.

(*f.*) The amount of the principal of the bonds secured by the general mortgage and the unpaid coupons on said bonds, inclusive of the coupons due from April 1st, 1888, with six per cent. interest from the maturity thereof in gold coin of the United States, less whatever sums may be received by the general mortgage trustee as the holder of bonds secured by previous mortgages; that bonds secured by the said first mortgage to the amount of five million eight hundred and thirty-eight thousand dollars were issued; that bonds secured by the Western division first mortgage to the amount of four million seven hundred and eighty-four thousand dollars were issued; that bonds secured by the Waco & Northwestern division to the amount of five hundred and sixty-seven thousand dollars were issued; that bonds secured by the income and indemnity mortgage to the amount of one milllon five hundred thousand dollars were issued, and under the general mortgage bonds to the amount of four million three hundred and twenty-five thousand dollars were issued; that the said decree fails to fix and the court fails to find the amount due from the said Houston & Texas Central Railway Company under the said several mortgages due prior to the recording of the said decree, and fails to find the amounts of cash in the hands of the trustees belonging to and forming a part of sinking fund pro-
vided under general mortgage, and fails to fix the amounts
106 due under the said mortgages after deducting the amounts of
promissory notes representing the proceeds of sales of a large
portion of lands made by the receivers subject to the said mort-

gages, and fails to fix or deduct the amounts in the hands of said receivers, and in no way fixes definitely the amount to be paid by the said company in order to prevent the sale of said property.

And in and by the decree it was provided that in default of making payments as therein directed within the said thirty days the equity of redemption of the said company and of all persons claiming under it since the execution of the said mortgages and of all parties to the suit shall be barred and foreclosed, and the said mortgaged premises sold at public auction under the direction of a special master commissioner, the said Charles Dillingham being appointed such master commissioner, who, as hereinafter alleged, was one of the directors of the Houston & Texas Central Railway Company (No. 1).

That in and by the said decree the only default found to exist was the failure to pay the interest upon the bonds from the dates set forth in the decree, and no fact was found or stated or testimony heard showing a default in the payment of the principal of the bonds, which, as hereinbefore set forth, was not due.

The decree further provided that the said special master commissioner, on default being made in paying and redeeming the said railway company from the lien of mortgages as therein provided, shall sell the said railway, but it in no way provides, in accordance with the conditions of the said mortgages as herein set forth, for the sale, first, of the said land grants included and covered by the said respective mortgages before the railway itself be sold or offered for sale, but, on the contrary, provides that the special master
107 commissioner shall offer for sale all the property, privileges, immunities, and franchises of every kind and description covered by the main line first mortgage and Western division first mortgage as one parcel and as an entirety, fixing as a minimum upset bid the sum of ten million five hundred thousand dollars; that he then offered for sale all the property of every kind and description covered by the main line and Western division consolidated mortgages which are not subject to either the main line first mortgage or the Western division first mortgages; that he next offer all the property, privileges, immunities, and franchises covered by the Waco and Northwestern division first mortgage as one parcel and as an entirety, subject to the first mortgage on the property dated June 16th, 1873; that he next offer all the property covered by the Waco and Northwestern consolidated mortgage as one parcel and as an entirety, which are not subject to the Waco and Northwestern

first mortgage; that he next offer the property covered by the income and indemnity mortgage and the general mortgage not covered by the main line first mortgage, the Western division first mortgage, and the Waco division first mortgage, the main line and Western division consolidated or the Waco division consolidated mortgages; and that after having so offered the properties the said special master commissioner shall offer as one parcel and as an entirety the whole of the properties of every sort and description of the said Houston & Texas Central Railway Company, with the exception of the railway land grants and property subject to the first mortgage on the Waco and Northwestern division, and if the highest bid received by him for the whole of the said property exceeds the aggregate amount of the several highest bids for the several portions of the said property, then the whole shall be
108 sold as an entirety to the person making the highest bid; and
it was further provided in and by the said decree that within twenty days from the confirmation of the said sale the purchaser shall deposit the amount of his or their respective bids in the Central Trust Company in the city of New York to the credit of the master commissioner, which said trust company was in and by the said plan of reorganization appointed the purchasing trustee, as hereinbefore set forth. Your orators beg to refer to said decree on file with the clerk of this court.

Accordingly, the said property was offered for sale under the said decree and sold, on the 8th of September following the entry of the decree, to Frederic P. Olcott, the president of the Central Trust Company, for the sum of ten million five hundred and eighty thousand dollars, which included in the one bid and purchase all the property of the said railway, including all its franchises and all its land grants, covering four million three hundred and forty thousand three hundred and thirty-nine acres, excepting the Waco & Northwestern division, which was sold to George E. Downs, who made the said purchase through his attorney, Ernest B. Kruttschnitt, who was one of the attorneys of the Southern Development Company in said suit against the Houston & Texas Central Railway Co., hereinbefore referred to. The said latter sale included in the one bid and purchase all the property of said division, including all its franchises and land grants, covering two hundred and seventy-seven thousand two hundred acres; that the said purchase was made in pursuance of the said plan of reorganization hereinbefore referred to, and that in making said purchase said George E. Downs was acting for and in the interest of said Huntington and his associates, who were the real purchasers of said property.

109 That the said Central Trust Company was, as aforesaid, in and by the same plan of reorganization, trustee of the fund and the purchasing committee to assist in carrying out said plan of reorganization, and by its acts and proceedings made itself a party to the proceedings and submitted itself to the jurisdiction of this court in regard to the premises, and the said Olcott and Downs, by purchasing at the said sale under the said decree of this court, became parties to the said suit and submitted themselves to the jurisdiction of this court in reference to the subject-matter of the said suit, as your orators aver on information and belief.

10. Complainants further allege that, as they are advised and believe and charge, the said decree was and is absolutely invalid and void and beyond the power of the court to grant; that there was no foundation for said decree or jurisdiction in the court to award it, and that the same was entered by consent and agreement and without any investigation or adjudication by the court, but was the result of agreement simply and was procured, as complainants allege on information and belief, by collusion and fraud on the part of said Huntington and his associates and the directors and officers of said Houston & Texas Central Railway Company, and was and is a part of the scheme to acquire possession of said railway in the interest of said Huntington and the said Southern Pacific Company without regard to the rights or interests of the holders of the stock of the said company No. 1 and in direct disregard of the provisions and terms of the mortgages; that the defenses interposed that the principal of the mortgages had not become due and that the said railway could not be sold without a sale first of the lands and the other defenses interposed were substantially aban-
110 doned and withdrawn as part of the said wrongful and fraudulent scheme herein referred to; that the said defenses were never submitted to the court for adjudication or determination, nor was evidence heard or offered to sustain the same, but the decree was the result of the agreement which the bondholders had made with the said Southern Pacific Company and Central Trust Company, and the rights of the stockholders were not considered or protected by any of the parties to the record in said cause, nor submitted to the court for adjudication or investigation, nor were the stockholders in any way advised or permitted to be informed of the transaction herein complained of.

Complainants further allege that, as they are advised and believe, the said decree is void for the further reason that there was and is in the said decree no finding by the court fixing the amount due from the Houston & Texas Central Railway Company (No. 1) under said several mortgages at and prior to the recording of the said decree and fixing the amount which the said company was required to pay to redeem its franchises, property, and rights from the lien of the said mortgages, nor was there nor has there been any judicial inquiry into that matter, and that the said decree contradicts the provisions of the several mortgages set up in the bills asking foreclosure, and is non-judicial and void.

That with the purchase of the said main line and divisions sold as aforesaid to the said Frederic P. Olcott for $10,580.00 there was included the land grants hereinbefore referred to, amounting to 4,340,339 acres, exclusive of the lands pertaining to the railways themselves, and included — the sale of the Waco & Northwestern
division, sold to George E. Downs for $25,000, were land grants
111 estimated at about 277,200 acres, exclusive of the lands per-
taining to the railway, in all aggregating 4,617,539 acres; that, as hereinbefore shown, no provision was made in the decree for the sale of the lands before the road itself was offered for sale or sold as provided by the mortgage; but after the railroad had been sold under the said decree to the said Olcott and Downs an application was made on behalf of said purchasers to relieve Easton and Rintoul from further duties as receivers, and to permit the remaining receiver, Dillingham, to sell certain of the lands for and on account of the said Olcott & Downs, it being represented to the court by the said petitioners that it is likely delay will elapse in the interval between the confirmation of the sale and the final delivery of the property; that said petition was granted, and thereupon and in the month of October, 1889, 56,000 acres of land in Jasper and Newton counties were sold at $5 an acre, making a total of $280,000 realized from that sale alone.

11. Complainants have since learned and allege that on acquiring the possession of the said railway under the said foreclosure sale, said Huntington and his associates caused to be filed articles of incorporation under the laws of the State of Texas, organized and incorporating a railway company known as the Houston & Texas Central Railroad Company (which is herein designated as No. 2), taking almost the same title and name as the corporation of which the complainants are stockholders for the purpose of operating the said

railway and its franchise, claimed by them to have been purchased and acquired at the said foreclosure sale, and thereupon and on or about the 1st of September, 1889, issued a notice to the stockholders of the said Houston & Texas Central Railway Company (No. 1),
including these complainants, that they could participate
112 in and become entitled to an equal number of shares of the
Houston & Texas Central Railroad Company (No. 2) as may be held by them in company No. 1, provided they pay an assessment of seventy-three dollars upon each share of stock held by them; that said assessment was wrongfully and fraudulently contrived and made up by said Huntington and his associates as a part of their scheme and plan for obtaining possession of the said Houston & Texas Central Railway, and that said assessment was not fixed and determined by the Central Trust Company, who alone and exclusively was authorized by said articles of reorganization to fix and determine said amount, and no assessment has been fixed and determined by said Central Trust Company at any time, nor is the floating indebtedness of the company No. 1 correctly stated, but the same is much less than is alleged by said Huntington and his associates.

That said assessment is an attempt to compel the stockholders of company No. 1 to turn over their stock to said Huntington and his associates and to purchase from said Huntington and his associates stock in the new company.

12. That said railway property and the rights and interests of the stockholders therein are of great value, and complainants verily believe that if said railway was operated with a view to the interests of the stockholders the property could be cleared from all incumbrances, the interest due upon the bonds be paid, the bonds taken up at maturity, and payment of the same satisfactorily arranged and the railway become again one of the most profitable and valuable in the State of Texas.

That during the period the said railway was operated by the receivers of the court sufficient moneys were realized to pay the
operating expenses, and not only for needful and necessary
113 repairs, but also for considerable expenditures in placing the
road in a high state of excellence, and that further said receivers were enabled out of the surplus to pay over one milion dollars interest on its bonded indebtedness, as complainants are informed; the exact amount they are unable to state, and the same is

not recited or ascertained by the decree procured and entered as aforesaid.

That the floating indebtedness of the company has not been correctly ascertained and the amount of the same as set forth by said Huntington and his associates, to wit, $2,446,676.77 (exclusive of interest and bonus mentioned in the reorganization agreement), is greatly in excess of the amount properly due.

That this excessive and erroneous statement of the floating indebtedness was made up and fraudulently contrived by said Huntington and his associates for the purpose of giving an apparent reason and excuse for the enormous assessment of seventy-three per cent., as aforesaid, and to compel the stockholders to relinquish all their rights to the property and to permit the Southern Pacific R'y Co., owned and controlled by said Huntington and his associates as aforesaid, to acquire the entire stock of said railway company No. 1 on payment merely of the interest due and the comparatively small costs of the reorganization.

That said floating indebtedness is composed and made up of sums claimed to be due the various corporations under the control and largely owned by the said Huntington and his associates, and that in many instances these latter have fraudulently contrived and permitted judgments to be had against said railway company No. 1 by these said other corporations and others, said Huntington and his associates thus betraying the interests of those whom it
114 was their bounden duty as directors and officers of said railway company No. 1 to protect.

13. That, believing, as they had a right to believe, that the interests of the stockholders in said company No. 1 would be properly protected and secured in any legal proceedings that might be pending; that proper defenses would be interposed and litigated in good faith; that no collusive judgments would be entered, but that in all matters pertaining to the corporation the directors and officers thereof would act, as it was their bounden duty to act, for the best interests of the property placed in their charge and under their control; and, further, being in ignorance of and unacquainted with the terms of said plan of reorganization until some time in September, 1889, when for the first time they were permitted to know of and have and read a copy of the agreement as to the same, and being unable to obtain any information or knowledge as to the matters herein complained of, which occurred and took place at points widely apart and remote from the residence of your com-

plainants, many of whom were at that time and still are citizens and residents of Great Britain, your complainants remained in ignorance of the transactions herein set forth; and, furthermore, said Huntington and his associates wrongfully and intentionally concealed from your complainants said transactions complained of, thus compelling them to remain silent; but on learning of the assessment aforesaid they were thereby warned of the wrongful and fraudulent nature of said transactions, which they at once took steps to investigate, with the result that they became aware of the details and import of said plan of reorganization, which they immediately dissented from and the terms thereof, and, causing further investigation to be made, for the first time ascertained the methods
115 by which the said Huntington and his associates have wrongfully acquired possession of said railway and its property, the nature and incidents of the decree procured by them, and the total disregard and violation of the rights of the stockholders of the company by the directors and officers thereof.

That complainants were not parties to said consolidated cause No. 198 nor any of the other suits, nor did they consent in any manner to the said plan of reorganization at any time, nor were the facts of the entry of said decree in consolidated cause or the terms thereof known to the complainants until very recently.

14. That the said Houston & Texas Central Railroad Company No. 2 is capitalized to the amount of ten million dollars, and it is intended to issue the said mortgage bonds referred to in the said plan of reorganization and place the same upon the market. Wherefore immediate action by the equitable interposition of a court of equity is absolutely essential for the protection of the rights of the complainants and other stockholders, to prevent the said stock and bonds reaching the hands of innocent holders; that the said stock and bonds are all ready to be issued, as complainants allege on information and belief, and are only waiting formal authorization at a meeting called or to be called.

15. That at the time of the said sale the said railway was operated as aforesaid by the said Charles Dillingham and said Easton and Rintoul as the receivers appointed in the said consolidated cause, and the board of directors of the said company last elected consisted of the defendants Collis P. Huntington, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, Charles Dillingham, J. J. Atkinson, A. H. Swanson, E. W. Cave, and Charles Fowler, of which A. C. Hutchinson was elected president.

116 That the said directors acted and are acting with and in the interest of the said Huntington and his syndicate and the said Southern Pacific Company, and have interests inimical to those of the complainants and other stockholders similarly situated; that the said Collis P. Huntington, as hereinbefore stated, is vice-president of the Southern Pacific Company, the said Isaac C. Gates is the acting vice-president, the said Dillingham, one of the receivers hereinbefore referred to, the special master commissioner conducting the sale, and also is one of the directors in the H. & T. C. R. R. Co. (No. 2); the said A. C. Hutchinson is the vice-president of the Galveston, Harrison & San Antonio railway, of which the said Huntington is president, and which is one of the proprietary lines of the said Southern Pacific Company; the said J. G. Schriever is vice-president of the Morgan's Louisiana and Texas Railroad & Steamship Co. and a director jointly with the said Huntington, and which road, as hereinbefore set forth, is one of the proprietary lines of the said Southern Pacific Co.; that the said E. W. Cave is a member of the board of directors of the Texas & New Orleans railroad, of which the said Huntington is president, and which is one of the proprietary lines of the Southern Pacific Company, and also is one of the directors of the Houston & Texas Central Railroad Company (No. 2), as are also J. J. Atkinson and Charles Fowler.

That heretofore an action was commenced on behalf of certain stockholders in the supreme court of the State of New York against the said Huntington, his associates, and others, and the said Houston & Texas Central Railway Company No. 1; that in. the complaint in said action, of which a copy was duly served upon said Huntington, in his individual capacity and also as a director of said corporation, the facts herein averred were set forth at length and notice
117 given thereby to the directors and those in control of said corporation of the wrong substantially as charged in this bill, and by the said suit the directors were notified to correct the said grievances complained of, and to that end take such steps as might be proper to vacate and set aside the decree in the consolidated cause No. 198, or appeal therefrom or take such action therewith as might be meet and proper for the protection and rights of the stockholders, but the said Huntington and others disputed the rights of the stockholders in the premises, and the said Huntington and his said associates caused answers to be interposed in said suit by the purchasing trustee, the Central Trust Company, and said Olcott, and others, and by counsel, and in their answers contended that the said decree was

valid and binding upon all the stockholders of the said corporation, and assumed a position antagonistic and inimical to that taken by the plaintiffs in said action and by your orators in this, and urged the right of the Houston & Texas Central Railway Company to mortgage the road, as they threaten to do.

That the said Dillingham was aforesaid one of the board of directors, but who, as hereinbefore set forth, permitted the entry of the said decree and suffered the property of said company No. 1 to be disposed of as herein charged; that any notice to said board of directors or any of them to institute suit or proceed to vacate the said decree and sale or appeal therefrom would be a futile formality and of no avail whatever, and any notice given to commence suit would only result, as complainants verily believe and charge, in the said Huntington and his associates, who originally perpetuated said wrongs, executing and recording the mortgages and issuing the bonds, to complainants' irreparable injury, and otherwise
118 proceeding pursuant to their plan of reorganization in anticipation of any action which might be brought by complainants.

That the said directors and those who control the action of said corporation are acting for their own interests in a manner destructive of the company and of the rights of the shareholders, and your orators have made an earnest effort in good faith to obtain redress at the hands of the directors and shareholders of the company, and your orators aver and state that this suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no jurisdiction.

16. That the defendants John S. Waters, Samuel W. Fields, A. W. Childress, R. B. Ascue, T. R. Price, Jr., N. W. Key, William J. Jardine, M. Early, John B. Haynie, Robert B. Hickman, Marshall H. Levy, Albert E. Jenkins, Thomas Maroney, T. H. Arnold, J. M. Kewley, John C. Greer, S. R. Baykin, Daniel A. Cabeen, Isaac B. Clark, Henry Malloy, Charles H. Bussey, Jerry O'Hara, Abraham Meyer, James Patten, William Brinn, J. M. Justice, Margaret Farris, John Butler Terrell, J. T. Bennett, James Carson, George A. Hill, Thomas M. Shirley, Charles I. Beisner, G. Mayhoff, Lizzie Lee, Alfred J. Barrager, Elizabeth Peregoy, Cyrus Smith, Michael Tierney, John J. Atchison, Samuel Ayers, Robert Brewster, and The Lone Star Land Company were defendants in the said consolidated cause commenced in this court hereinbefore referred to, and they claim to have some lien or interest in the said Houston and Texas

Central Railway Company No. 1 by way of money judgment or otherwise.

17. That this suit is brought by complainants in their own behalf and for the benefit of all stockholders of the said Houston and Texas Central Railway Company No. 1 similarly situated, and who
may desire to come in and contribute to the expenses of this
119 action and receive the benefits thereof.

All which acting-, doings, and pretences of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orators in the premises; in consideration whereof and forasmuch as your orators are entirely remediless in the premises according to the strict rule of the common law, they pray, as they have already prayed in the original bill of complaint filed in this cause, that the said defendants and each of them may, if they can, show why your orators should not have the relief hereby prayed for, and that they may separately and severally true, direct, and perfect answers make (but not under oath, their answers under oath being hereby expressly waived), according to the best of their knowledge and belief, to all and singular the matters and charges aforesaid, and that as fully in every respect as if the same were here repeated and they thereunto particularly interrogated; that the decree rendered by this court on the 4th day of May, 1888, in said consolidated cause No. 198, in the suit of Nelson S. Easton and James Rintoul, trustees, and the Farmers' Loan and Trust Company, as trustees, against the Houston & Texas Central Railway Company and others be vacated and set aside and adjudged and decreed to be fraudulent, collusive, illegal, and void; that your orators may be permitted to intervene and become parties defendant in said suit and permitted to be heard and defend the same; that the sale of the railroad and the lands of the said Houston & Texas Central Railway Company No. 1 under said decree be vacated and set aside, and the said railway and lands restored to the possession of the receivers appointed by this court or such
other officers or receivers as the court may name; that the
120 defendants, their and each of their servants, agents, attorneys, and employees, may, by writ of injunction issued out of and under the seal of this court, be enjoined and restrained during the pendency of this suit and thereafter perpetually from executing or delivering, filing, recording, registering or causing, suffering, or permitting to be filed, recorded, or registered in any register's office, clerk's office, or prothonotary's office any mortgage or deed of trust

upon the property of the Houston & Texas Central Railway Company referred to in said decree and the subject-matter of said consolidated cause or otherwise encumbering or selling or disposing of or alienating the property or franchises of the said company, and from executing and delivering, selling, hypothecating, giving away, or in any manner or form issuing, alienating, or parting with any shares of stock of the new or reorganized Houston & Texas Central Railroad Company (No. 2) or any bonds or bonds secured by mortgage upon the property claimed to be possessed by the Houston & Texas Central Railroad Company (No. 2) or any of the stock or bonds issued or intended so to be pursuant to the reorganization agreement between the mortgage bondholders of the said Houston & Texas Central Railway Company (No. 1) and the Southern Pacific Company and the Central Trust Company of the City of New York, dated December 20th, 1887, and that your orators may have such other or further relief in the premises as the circumstances of the case may require and as may be according to equity.

And your orators will ever pray.

R. H. LANDALE,
Solicitor for Complainants.

JEFFERSON CHANDLER, *Of Counsel.*

121 UNITED STATES OF AMERICA,
Southern District of New York, } *ss.:*

Warren S. Sillcocks, being duly sworn, deposes and says: I am one of the complainants herein who are united in interest. I know the contents of the foregoing amended bill of complaint. The same are true of my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

WARREN S. SILLCOCKS.

Sworn to before me this 14th day of Febr'y, 1890.

[SEAL.] THOS. S. WILLIAMS,
Notary Public, New York County.

141 *Answer of Defendant Olcott, Filed March 28, 1890.*

In the Circuit Court of the United States for the Eastern District of Texas. In Equity.

S. W. Carey and Others *against* The Houston and Texas Central Railway Company No. 1 and Others.	Answer of Defendant Frederic P. Olcott to the amended Bill of Complaint.

The defendant, Frederic P. Olcott, now and at all times hereafter saving and reserving to himself all manner of benefit and advantage of objection and exception which can or may be had or taken to the many errors, uncertainties and imperfections in the said amended bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material for him to make answer unto, answering, saith :

First. This defendant admits that the allegations of the said amended bill of complaint with respect to the organization and existence of the defendant the Houston and Texas Central Railroad Company and its ownership and possession of the lands and railway in that behalf mentioned in said amended bill are substantially true.

142 Second. This defendant does not know and is not informed save by said amended bill of complaint whether or not the complainants or any or either of them were or are stockholders of the Houston and Texas Central Ralway Company at any time or in any amounts whatsoever.

Third. This defendant admits that the description of the mortgages or deeds of trusts made and executed by the said defendant the Houston and Texas Central Railway Company as set forth in the Article or subdivision of the said amended bill numbered 3, is substantially correct, but for greater certainty this defendant prays leave to refer to the originals of said several mortgages or deeds of trust, or to true copies thereof when the same shall be produced.

This defendant further answering saith that he is a stranger to all and singular the matters stated and set forth in the article or subdivision of the said amended bill numbered 4, and does not know and is not informed save by said amended bill with respect to any of the allegations contained in said Article or subdivision 4, except that this defendant is informed and believes that it is not true that the rights of holders of the stock of the Houston and Texas Central Railway Company were at any time sought or attempted to be shut out or barred, or that it was at any time sought or

attempted that the absolute control of said company should be acquired by any syndicate so that the railway of said company might be run in the interest of the syndicate or of the
Southern Pacific Company or otherwise ; or that in January,
143 1885, or at any time it was fraudulenty or wrongfully contrived that coupons appertaining to the first mortgage bonds of the said railway company were cashed or taken up by the Southern Development Company, or without notice to the holders thereof, or that Charles Dillingham was at or before the time of his appointment as one of the Receivers of the property of said railway company, a director of the Houston and Texas Central Railway company.

This defendant admits the commencement of suits and the filing of bills of complaint and the appointment of Receivers substantially as set forth in said Article 4 of said amended bill, but for greater certainty prays leave to refer to the records of the said suits in this Court.

FOURTH. This defendant denies that none of said several mortgages permit the sale of said railway prior to the maturity of the principal of the bonds referred to in the said respective mortgages or either of them.

FIFTH. This defendant denies that the terms and provisions of the Main Line first mortgage, Western Division first mortgage, consolidated mortgage, or general mortgage of said Railway Company are truly, fully or correctly set forth in said amended bill and prays leave to refer to the original or true copies of said several mortgages for a true and correct statement of the several provisions
thereof respectively.

144 SIXTH. This defendant admits that on or about December
20th, 1887, an agreement of reorganization of said railway property was made, and for a proper description of the terms and provisions thereof he prays leave to refer to the original or to a true copy of said agreement of reorganization.

He denies that the negotiations in reference to said agreement of reorganization were had mainly with Collis P. Huntington, but alleges on information and belief that said negotiations were had mainly between the representatives of the bondholders and the officers of the Houston and Texas Central Railway Company and of the Southern Pacific Company, and the counsel of said representatives and of said several companies.

SEVENTH. This defendant admits the making and entry of a decree or judgment of the Court in the consolidated cause referred to in said amended bill, and for greater certainty as to the terms and provisions of said decree he prays leave to refer to the record thereof in this Court.

He denies upon information and belief that the said decree was entered by consent, or that the same fails to fix, or that the Court fails to find, the amount due under the said several mortgages, or that it in no way fixes the amount to be paid by the Company in order to prevent a sale of the mortgaged property.

He denies that there were any amounts of promissory notes representing proceeds of sale of lands which could properly have been deducted from the amounts due under the mortgages.

Eighth. This defendant has no knowledge and is not in-
145 formed save by said amended bill, whether or not the defendant,
George E. Downs, in making the purchase referred to in the 9th Article of the amended bill was acting in the interest of any other person or persons whomsoever.

Ninth. This defendant upon his information and belief denies that the said decree was or is invalid or void for any reason whatsoever or beyond the power of the Court to grant, or that there was no foundation for such decree or jurisdiction in the Court to award it, or that the same was entered by consent or agreement, or without investigation or adjudication by the Court, or that it was the result of agreement simply or was procured by collusion or fraud, or was or is fraudulent or part of any scheme alleged in the amended bill of complaint or in disregard of the provisions of the terms of the mortgages, or that the defenses interposed in the suit were abandoned or withdrawn as a part of any wrongful or fraudulent scheme, or that such defenses were never submitted to the Court for adjudication or investigation or that the stockholders of the Houston and Texas Central Railway Company were not in any way advised or permitted to be informed of the transaction referred to in the said amended bill, or that their rights were not considered or protected in and by the said decree; or that said decree contains no finding by the Court fixing the amount due from the Houston and Texas
Central Railway under the said several mortgages, or fixing
146 the amount which said company was required to pay to re-
deem its franchises, property and rights from the lien of the mortgages, or that the decree aforesaid contradicts any provisions of several mortgages or is non-judicial, or void, for the reasons alleged in the amended bill, or for any reason. On the contrary, this defendant alleges that the provisions of said decree in that behalf were and are in all respects regular and sufficient and in the usual form,

and further alleges on information and belief that there were and are no person, persons, corporation or corporations, both willing and able to pay even the amount of interest in default on said bonds secured by said mortgages respectively or to redeem the said railway and property from the liens of said several mortgages.

Tenth. This defendant has no knowledge or information sufficient to form a belief as to the names of any persons who are referred to in the Article or subdivision of the amended bill of complaint numbered 11, as the "associates" of said Huntington, but he denies that said Huntington has, with or without any associates, filed or caused to be filed any articles of incorporation under the laws of Texas organizing or incorporating any railway company known as Houston and Texas Central Railroad Company for the purpose of operating the said or any railway or its franchises. He alleges that as the designated agent of the defendant Central Trust Company of New York he became the purchaser of a portion 147 of the said line of railway at the foreclosure sale, and has caused articles of incorporation to be filed under the laws of Texas for the purpose of creating a corporation to acquire the said line of railway so purchased by him, known as the Houston and Central Railroad Company.

He denies that the notice of September 1st, 1889, referred to in the 11th Article or subdivision of the amended bill was issued by said Huntington or by said Huntington's authority or direction, but alleges that said notice was issued by said Central Trust Company only, under and in pursuance of the agreement of reorganization.

He denies that the assessment mentioned in the amended bill was wrongfully or fraudulently contrived, or made up by said Huntington or his associates as a part of any scheme or plan such as alleged in said amended bill. He denies that said assessment was not fixed and determined by the Central Trust Company. He denies that no assessment has been fixed or determined by said Central Trust Company, or that the floating indebtedness of the Houston and Texas Central Railway Company is not correctly stated, or that said assessment was or is an attempt to compel the stockholders of the old company to turn over their stock to said Huntingington or his associates, or to purchase from said Huntington or his associates stock in the new company.

148 This defendant is informed and believes that during the period of the Receivership referred to in the said amended bill, which has continued upwards of five years, the

Receivers have realized from the operation and management of the road sufficient moneys to pay the operating expenses of the road and needful and necessary repairs, and to defray the expense of placing the road in a proper condition for advantageous use and operation, and to pay the installments of interest on said first mortgage bonds (Main Line and Western Division) maturing respectively on January 1, 1885, and July 1, 1885, and also the further sum of $1,008,000 on account of interest on said first mortgage bonds (which is equal to five semi-annual installments of interest on such first mortgage bonds at five per cent. per annum), and also sufficient money to pay three installments of interest at six per cent. per annum on the Main Line and Western Division Consolidated Mortgage Bonds of said Railway Company; but he avers that the several installments of interest due, unpaid and in default during said period upon the outstanding mortgage obligations of the said Houston and Texas Central Railway Company amount in the aggregate to over four million dollars, after deducting said sum of $1,008,000, and without including interest on defaulted interest, or any interest on any of the Waco and Northwestern bonds. And this defendant further alleges that under the plan or agreement of 149 reorganization referred to in said amended bill of complaint the annual interest charge upon the property purchased by him under the plan is reduced from $1,138,000 to $869,000.

This defendant admits that the said railway is a valuable piece of property, but upon information and belief he denies that the interests of the stockholder of the old company therein are of great value, or that the said railroad could be so operated as to pay all the interest due upon the bonds of the old company, together with its floating debt.

This defendant admits that in pursuance of the agreement of reorganization aforesaid, the said Central Trust Company has fixed and determined the amount of the *pro rata* share in proportion to the whole outstanding capital of the old company of the amount required to discharge the floating debt of the company, and to provide for the cash payments, charges, expenses and liabilities incurred by it in carrying out the provisions of said agreement, which *pro rata* share must be provided by holders of the stock of the old company in order to entitle them to receive stock of the new company, and that such *pro rata* share is $73 per share of old stock.

He denies that the floating indebtedness of the company was not correctly ascertained, or that the amount thereof, to wit, $2,446,-

676.77, is greatly in excess of the amount properly due ; or that the statement referred to in the bill was made up or fraudulently
150 contrived by any person or persons for any improper purpose whatsoever or to compel the stockholders to relinquish any rights or to permit the Southern Pacific Railway Company to acquire the stock of the Railway Company on payment merely of the interest due and the costs of the reorganization.

He admits that said floating indebtedness is composed and made up in part of sums claimed to be due to various corporations in which said Huntington is a stockholder. He denies, upon information and belief, that said corporations or any of them or any person or persons have fraudulently contrived or permitted judgments to be had by any person or corporation against the old Railway Company.

This defendant alleges that said *pro rata* share was ascertained and determined by said Central Trust Company in good faith, and that the amount thereof was not more than sufficient to pay off and discharge the interest which is in default on the first mortgage Main Line and Western Division bonds maturing July 1st, 1885 to July 1st, 1887, inclusive ; the unpaid interest on the reduced basis from October 1st, 1887 ; the bonus given to the holders of the old first mortgage bonds ; the expenses of the reorganization ; and the floating debt of the old Company, the greater part of which debt is now in judgment ; and this defendant refers to a statement marked Exhibit "A," annexed to the answer of the Central Trust Company
151 in this suit, showing the amounts required to be provided under the 9th Article of the agreement of reorganization.

Eleventh. This defendant upon information and belief denies that the interests of the stockholders of the old company have not been properly protected or that any collusive judgments have been entered in the suits referred to in the amended bill of complaint.

He admits that the complainants were not individually parties to the foreclosure suit.

He alleges that the agreement of reorganization was made December 20th, 1887, and that it was made public about the same time, and that its terms and provisions were duly advertised in the public press, as well as in financial journals, and were matters of general knowledge among bankers in the City of New York and persons engaged in transactions relating to railway securities.

That the said decree of foreclosure and sale was made and entered May 4th, 1888, and that its entry was announced in the

public press and was well known in financial circles; that the sale of said railway and property was made on the 8th day of September, 1888, and was fully advertised, and was also a matter of general knowledge. And this defendant, upon information and belief,
152 alleges that the complainants at all times after the making of said reorganization agreement well knew, or had full and ample means of knowing of said agreement and of its terms and provisions; and also well knew, or had abundant opportunity to know, of said decree and the entry thereof, and of said sale. He denies that it was not until September, 1889, that complainants were permitted to know of or have or read a copy of said agreement, or that they were unable to obtain information or knowledge as to any facts relating to the reorganization; and upon information and belief he alleges that complainants did not, nor did any or either of them, ever ask for or apply to the Central Trust Company for any such information. He denies, upon information and belief, that any transactions relative to the said railway or its reorganization were at any time wrongfully concealed from complainants, or that the rights of shareholders have been disregarded or violated in such reorganization.

And this defendant, while insisting that the said decree and the said plan or agreement of reorganization contained no improper provisions in any way impairing the rights of the complainants or of any of the stockholders of the old company, charges and alleges that the said complainants have unreasonably delayed the assertion of their supposed rights and have been guilty of laches in the premises, and alleges, on information and belief, that their attempt to delay and prevent the execution of the plan of reorganization is
153 not made in good faith, but for the purposes of extorting from the bondholders and creditors of the old company some price and concession as a consideration for withdrawing their proceedings.

Twelfth. This defendant denies that the proposed new mortgage bonds referred to in said plan of reorganization are about to be placed upon the market except so far as the same may be so placed upon the market by the several persons who under the terms and provisions of said plan or reorganization are entitled to receive the same.

Thirteenth. This defendant admits that at the time of the sale the railway was operated by Receivers as alleged in the 15th Article or subdivision of the amended bill of complaint, and that Charles Dillingham was the Special Master Commissioner conducting the sale.

This defendant admits the commencement of an action in the

Supreme Court of the State of New York, as alleged in the 15th Article or subdivision of the said amended bill, and that answers have been interposed in said action alleging the validity of the decree of sale and the rights of the Railway Company to mortgage its property.

He admits that Charles Dillingham, E. W. Cave, J. J. Atkinson and Charles Fowler are directors of the Houston and Texas Central Railroad Company.

This defendant does not know and is not informed save by said amended bill, whether or not any other of the matters alleged in the 15th Article or subdivision of said amended bill are true. He
154 denies that any of the persons named in said Article are acting for their own interests in any manner destructive of the company or of the rights of the shareholders of the old company, or that the complainants have ever made any effort in good faith or otherwise to obtain redress at the hands of the officers or directors of the company.

He denies that the complainants have any right to any injunction or to any equitable relief in the premises.

Wherefore, this defendant prays for the judgment or decree of this Court dismissing the said amended bill of complaint as against this defendant, and that this defendant may have and recover of the complainants his costs and expenses of this suit in that behalf most wrongfully sustained.

BUTLER, STILLMAN & HUBBARD,
Solicitors for Defendant F. P. Olcott, 54 Wall St., N. Y. City.

ADRIAN H. JOLINE,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK,
State, City and County of New York, } ss.:

FREDERIC P. OLCOTT, being duly sworn, says that he has read the foregoing answer, and that the matters therein stated and set forth are true of his own knowledge except as to the matters which are therein stated to be upon information and belief, and as to
155 those matters he believes it to be true.

F. P. OLCOTT.

Sworn to before me this 24th
day of March, 1890. }

ADRIAN H. LARKIN,
[SEAL.] *Notary Public, New York City & Co.*

156 *Answer of Defendant Central Trust Company of New York, Filed March 28th 1890.*

In the Circuit Court of the United States, for the Eastern District of Texas. In Equity.

S. W. Carey and others
against
The Houston and Texas Central Railway Company, No. 1, and others.

Answer of Defendant Central Trust Company of New York to the amended Bill of Complaint.

The defendant the Central Trust Company of New York, now and at all times hereafter saving and reserving to itself all manner of benefit and advantage of objection and exception which can or may be had or taken to the many errors, uncertainties and imperfections in the said amended bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material for it to make answer unto, answering, saith:

First. This defendant admits that the allegations of the said amended bill of complaint with respect to the organization and existence of the defendant the Houston and Texas Central Railway Company and 157 its ownership and possession of the lands and railway in that behalf mentioned in said amended bill are substantially true.

Second. This defendant does not know and is not informed save by said amended bill of complaint whether or not the complainants or any or either of them were or are stockholders of the Houston and Texas Central Railway Company at any time or in any amounts whatsoever.

Third. This defendant admits that the description of the mortgages or deeds of trusts made and executed by the said defendant the Houston and Texas Central Railway Company as set forth in the Article or subdivision of the said amended bill numbered 3, is substantially correct, but for greater certainty this defendant prays leave to refer to the originals of said several mortgages or deeds of trust or to true copies thereof when the same shall be produced.

This defendant, further answering, saith that it is a stranger to all and singular the matters stated and set forth in the Article or subdivision of the said amended bill numbered 4, and does not know and is not informed save by said amended bill with respect to any of the allegations contained in said Article or subdivision 4, except that this defendant is informed and believes that it is not true that

the rights of holders of the stock of the Houston and Texas Central Railway Company were at any time sought or attempted to
158 be shut out or barred, or that it was at any time sought or
attempted that the absolute control of said company should be acquired by any syndicate so that the railway of said company might be run in the interest of the syndicate, or of the Southern Pacific Company or otherwise; or that in January, 1885, or at any time it was fraudulently or wrongfully contrived that coupons appertaining to the first mortgage bonds of the said Railway Company were cashed or taken up by the Southern Development Company, or without notice to the holders thereof, or that Charles Dillingham was at or before the time of his appointment as one of the Receivers of the property of said railway company, a director of the Houston and Texas Central Railway Company.

This defendant admits the commencement of suits and the filing of bills of complaint and the appointment of Receivers substantially as set forth in said Article 4 of said amended bill, but for greater certainty prays leave to refer to the records of the said suits in this Court.

FOURTH. This defendant denies that none of said several mortgages permit the sale of said railway prior to the maturity of the principal of the bonds referred to in the said respective mortgages or either of them.

FIFTH. This defendant denies that the terms and provisions of the Main Line first mortgage, Western Division first mortgage, Consolidated mortgage or general mortgage of said Railway Com-
159 pany are truly, fully or correctly set forth in said amended
bill and prays leave to refer to the original or true copies of said several mortgages for a true and correct statement of the several provisions thereof respectively.

SIXTH. This defendant admits that on or about December 20th, 1887, an agreement of reorganization of said railway property was made, and for a proper description of the terms and provisions thereof it prays leave to refer to the original or to a true copy of said agreement of reorganization.

It denies that the negotiations in reference to said agreement of reorganization were had mainly with Collis P. Huntington, but alleges on information and belief that said negotiations were had mainly between the representatives of the bondholders and the officers of the Houston and Texas Central Railway Company and of the Southern Pacific Company, and the counsel of said representatives and of said several companies.

Seventh. This defendant admits the making and entry of a decree or judgment of the Court in the consolidated cause referred to in the said amended bill, and for greater certainty as to the terms and provisions of said decree it prays leave to refer to the record thereof in this Court.

160 It denies upon information and belief that the said decree was entered by consent, or that the same fails to fix, or that the Court fails to find the amount due under the said several mortgages, or that it in no way fixes the amount to be paid by the company in order to prevent a sale of the mortgaged property.

It denies that there were any amounts of promissory notes representing proceeds of sale of lands which could properly have been deducted from the amounts due under the mortgages.

Eighth. This defendant has no knowledge and is not informed save by said amended bill, whether or not the defendant George E. Downs, in making the purchase referred to in the 9th Article of the amended bill was acting in the interest of any other person or persons whomsoever.

Ninth. This defendant, upon its information and belief, denies that the said decree was or is invalid or void for any reason whatsoever or beyond the power of the Court to grant, or that there was no foundation for such decree or jurisdiction in the Court to award it, or that the same was entered by consent or agreement, or without investigation or adjudication by the Court, or that it was the result of agreement simply or was procured by collusion or fraud, or was or is fraudulent or part of any scheme alleged in the amended bill of complaint or in disregard of the provisions of the terms of the
mortgages, or that the defenses interposed in the suit were
161 abandoned or withdrawn as a part of any wrongful or fraudulent scheme, or that such defenses were never submitted to the Court for adjudication or investigation or that the stockholders of the Houston and Texas Central Railway Company were not in any way advised or permitted to be informed of the transaction referred to in the said amended bill, or that their rights were not considered or protected in and by the said decree; or that said decree contains no finding by the Court fixing the amount due from the Houston and Texas Central Railway under the said several mortgages, or fixing the amount which said company was required to pay to redeem its franchises, property and rights from the lien of the mortgages, or that the decree aforesaid contradicts any provisions of several mortgages or is non-judicial, or void, for the reasons alleged

in the amended bill, or for any reason. On the contrary, this defendant alleges that the provisions of said decree in that behalf were and are in all respects regular and sufficient and in the usual form, and further alleges on information and belief that there were and are no person, persons, corporation or corporations, both willing and able to pay even the amount of interest in default on said bonds secured by said mortgages respectively or to redeem the said railway and property from the liens of said several mortgages.

162 Tenth. This defendant has no knowledge or information sufficient to form a belief as to the names of any persons who are referred to in the Article or subdivision of the amended bill of complaint numbered 11 as the "associates" of said Huntington, but denies that said Huntington has, with or without any associates, filed or caused to be filed any articles of incorporation under the laws of Texas organizing or incorporating any Railway Company known as Houston and Texas Central Railroad Company for the purpose of operating the said or any railway or its franchises. It alleges that its designated agent, the defendant Frederic P. Olcott, became the purchaser of a portion of the said line of railway at the foreclosure sale, and has caused articles of incorporation to be filed under the laws of Texas for the purpose of creating a corporation to acquire the said line of railway so purchased by him, known as the Houston and Central Railroad Company.

It denies that the notice of September 1st, 1889, referred to in the 11th Article or subdivision of the bill of complaint was issued by said Huntington or by said Huntington's authority or discretion, but alleges that said notice was issued by this defendant only, under and in pursuance of the agreement of reorganizatlon.

163 It denies that the assessment mentioned in the amended bill was wrongfully or fraudulently contrived, or made up by said Huntington or his associates as a part of any scheme or plan such as alleged in said amended bill. It denies that said assessment was not fixed and determined by the Central Trust Company. It denies that no assessment has been fixed or determined by said Central Trust Company, or that the floating indebtedness of the Houston and Texas Central Railway Company is not correctly stated, or that said assessment was or is an attempt to compel the stockholders of the old company to turn over their stock to said Huntington or his associates, or to purchase from said Huntington or his associates stock in the new company.

This defendant is informed and believes that during the period

of the receivership referred to in the said amended bill, which has continued upwards of five years, the Receivers have realized from the operation and management of the road sufficient moneys to pay the operating expenses of the road and needful and necessary repairs, and to defray the expense of placing the road in a proper condition for advantageous use and operation, and to pay the installments of interest on said first mortgage bonds (Main Line and Western Division) maturing respectively on January 1, 1885, and July 1, 1885, and also the further sum of $1,008,000 on account of interest on said first mortgage bonds (which is equal to five semi-annual installments of interest on such
164 first mortgage bonds at five per cent. per annum), and also sufficient money to pay three installments of interest at six per cent. per annum on the Main Line and Western Division Consolidated Mortgage Bonds of said Railway Company; but it avers that the several installments of interest due, unpaid and in default during said period upon the outstanding mortgage obligations of the said Houston and Texas Central Railway Company amount in the aggregate to over four million dollars, after deducting said sum of $1,008,000, and without including interest on defaulted interest, or any interest on any of the Waco and Northwestern bonds. And this defendant further alleges that under the plan or agreement of reorganization referred to in said amended bill of complaint the annual interest charge upon the property purchased by him under the plan is reduced from $1,138,000 to $869,000.

This defendant admits that the said railway is a valuable piece of property, but upon information and belief it denies that the interests of the stockholders of the old company therein are of great value, or that the said railroad could be so operated as to pay all the interest due upon the bonds of the old company, together with its floating debt.

165 This defendant admits that in pursuance of the agreement of reorganization aforesaid, it has fixed and determined the amount of the *pro rata* share in proportion to the whole outstanding capital of the old company of the amount required to discharge the floating debt of the company, and to provide for the cash payments, charges, expenses and liabilities incurred by it in carrying out the provisions of said agreement, which *pro rata* share must be provided by holders of stock of the old company in order to entitle them to receive stock of the new company, and that such *pro rata* share is $73 per share of old stock.

It denies that the floating indebtedness of the company was not correctly ascertained, or that the amount thereof, to wit, $2,446,-676.77, is greatly in excess of the amount properly due; or that the statement referred to in the bill was made up or fraudulently contrived by any person or persons for any improper purpose whatsoever or to compel the stockholders to relinquish any rights or to permit the Southern Pacific Railway Company to acquire the stock of the Railway Company on payment merely of the interest due and the costs of the reorganization.

It admits that said floating indebtedness is composed and made up in part of sums claimed to be due to various corporations in
which said Huntington is a stockholder. It denies, upon in-
166 formation and belief, that said corporations or any of them
or any person or persons have fraudulently contrived or permitted judgments to be had by any person or corporation against the old Railway Company.

This defendant alleges that said *pro rata* share was ascertained and determined by said Central Trust Company in good faith, and that the amount thereof was not more than sufficient to pay off and discharge the interest which is in default on the first mortgage Main Line and Western Division bonds maturing July 1st, 1885, to July 1st, 1887, inclusive; the unpaid interest on the reduced basis from October 1st, 1887; the bonus given to the holders of the old first mortgage bonds; the expenses of the reorganization, and the floating debt of the old company, the greater part of which debt is now in judgment; and this defendant annexes to this answer as a part thereof a statement marked Exhibit "A," showing the amounts required to be provided under the 9th Article of the agreement of reorganization.

ELEVENTH. This defendant, upon information and belief, denies that the interests of the stockholders of the old company have not been properly protected or that any collusive judgments have been entered in the suits referred to in the amended bill of complaint.

It admits that the complainants were not individually
167 parties to the foreclosure suit.

It alleges that the agreement of reorganization was made December 20th, 1887, and that it was made public about the same time, and that its terms and provisions were duly advertised in the public press, as well as in financial journals, and were matters of general knowledge among bankers in the City of New York and persons engaged in transactions relating to railway securities.

That the said decree of foreclosure and sale was made and entered May 4th, 1888, and that its entry was announced in the public press and was well known in financial circles; that the sale of said railway and property was made on the 8th day of September, 1888, and was fully advertised, and was also a matter of general knowledge. And this defendant, upon information and belief, alleges that the complainants at all times after the making of said reorganization agreement well knew, or had full and ample means of knowing, of said agreement and of its terms and provisions, and also well knew, or had abundant opportunity to know, of said decree and the entry thereof, and of said sale. It denies that it was not until September, 1889, that complainants were permitted to know of or have or read a copy of said agreement, or that they were unable to obtain information or knowledge as to any 168 facts relating to the reorganization; and upon information and belief it alleges that complainants did not, nor did any or either of them, ever ask for or apply to the Central Trust Company for any such information. It denies, upon information and belief, that any transactions relative to the said railway or its reorganization were at any time wrongfully concealed from complainants, or that the rights of shareholders have been disregarded or violated in such reorganization.

And this defendant, while insisting that the said decree and the said plan or agreement of reorganization contained no improper provisions in any way impairing the rights of the complainants or of any of the stockholders of the old company, charges and alleges that the said complainants have unreasonably delayed the assertion of their supposed rights and have been guilty of laches in the premises, and alleges, on information and belief, that their attempt to delay and prevent the execution of the plan of reorganization is not made in good faith, but for the purposes of extorting from the bondholders and creditors of the old company some price and concession as a consideration for withdrawing their proceedings.

TWELFTH. This defendant denies that the proposed new mortgage bonds referred to in said plan of reorganization are about to be placed upon the market except so far as the same may be so 169 placed upon the market by the several persons who under the terms and provisions of said plan of reorganization are entitled to receive the same.

THIRTEENTH. This defendant admits that at the time of the sale the railway was operated by Receivers as alleged in the 15th Article or subdivision of the amended bill of complaint, and that Charles

Dillingham was the Special Master Commissioner conducting the sale.

This defendant admits the commencement of an action in the Supreme Court of the State of New York, as alleged in the 15th Article or subdivision of the said amended bill, and that answers have been interposed in said action alleging the validity of the decree of sale and the rights of the Railway Company to mortgage its property.

It admits that Charles Dillingham, E. W. Cave, J. J. Atkinson and Charles Fowler are directors of the Houston and Texas Central Railroad Company.

This defendant does not know and is not informed save by said amended bill, whether or not any other of the matters alleged in the 15th Article or subdivision of said amended bill are true. It denies that any of the persons named in said Article are acting for their
own interests in any manner destructive of the company or of
170 the rights of the shareholders of the old company or that the
complainants have ever made any effort in good faith or otherwise to obtain redress at the hands of the officers or directors of the company.

It denies that the complainants have any right to any injunction or to any equitable relief in the premises.

Wherefore, this defendant prays for the judgment or decree of this Court dismissing the said amended bill of complaint as against this defendant, and that this defendant may have and recover of the complainants its costs and expenses of this suit in that behalf most wrongfully sustained.

BUTLER, STILLMAN & HUBBARD,
Solicitors for Defendant Central Trust Company of New York, 54 Wall St., N. Y. City.

ADRIAN H. JOLINE,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK,
State, City and County of New York, } ss. :

FREDERIC P. OLCOTT, being duly sworn, says that he is the president of the defendant, the Central Trust Company of New York; that he has read the foregoing answer, and that the matters therein stated and set forth are true of his own knowledge, except as to the matters which are therein stated to be upon information and belief, and as to those matters he believes it to be true.

F. P. OLCOTT.

Sworn to before me this 24th day of March, 1890.

ADRIAN H. LARKIN,

[SEAL.] *Notary Public, New York City and Co.*

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171 Exhibit A.

Memorandum showing amounts required under Article IX. of reorganization agreement Houston and Texas Central Railway.

I.

Bonus on old 1st mortgage bonds $50 on 8,064 bonds	$403,200 00	
Interest at 6% to Dec. 1, 1889, on amounts paid	35,548 21	
		$438,743 21
Interest at 7% on $8,064,000, 1st mortgage bonds, July 1/85 to July 1, 1887		1,128,960 00
Interest at 5% from July 1/89 to Dec. 1, 1889, on $8,064,000 bonds		168,000 00
Interest Oct. 1/87 to Dec. 1/89, at 6% on $3,919,000 cons'd bonds	509,470	
4% on $4,305,000, genl's	373,100	
6% on $705,420, debentures	91,704 60	
4% on $411,000, do	35,620	
		1,009,894 60
Total		$2,745,602 81

II.

Lackawanna Iron & Coal Co.		$569,126 64
Morgan's La. & Tex. R. R. & S. S Co.	$1,702,364 14	
Less realization on collaterals estimated at	112,000	
	$1,590,364 14	
Southern Development Co.	$866,302 93	
	$2,456,667 07	
Less $880,000, General Mortgage Bonds at par	$880,000	
		$1,576,667 07
National City Bank	64,200	
Less $65,000, Genl. Mtg. Bonds at 80 3/4 –79 1/4	51,512 50	
		12,687 50
172 Wm. Hawkhurst, N. Y.	17,255 25	
S. S. Allen, Houston	10,300	
Notes issued for supplies	572 88	
Vouches unpaid	33,289 72	
Traffic Balances	68,022 11	
Sundry Claims	32,951 55	
Miscellaneous Accounts	5,147 86	
Wages unclaimed prior to Feb. 1/84	27,784 23	
Wages unclaimed since Feb. 1/84	3,533 80	
Judgments affirmed in Appellate Court	48,976 32	
Judgments pending in Appellate Court	34,713 93	
Judgments obtained in Lower Court	66,383 69	
Suits entered	565,067	
		913,998 34
Total		3,072,479 55

SUMMARY.

I.	$2,745,602 81
II.	3,072,479 55
Total	$5,818,082 36
Deduct for excess of estimated discount on various claims, above amounts to be paid Central Trust Company and its Counsel and other expenses incident to reorganization	$177,445 36
	$5,640,637 00

Existing Capital Stock	$7,726,900 00
73% thereon	5,640,637 00

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178 *Answer of Defendant The Farmers' Loan and Trust Company to Amended Bill of Complaint. Filed April 21st,* 1890.

Circuit Court of the United States, Eastern District of Texas.

S. W. CAREY and Others *against* THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY and Others.	Answer of Defendant The Farmers' Loan & Trust Company to Amended Bill of Complaint.

The defendant The Farmers' Loan and Trust Company, now and at all times hereafter, saving and reserving to itself all man-er of benefit and advantage of objection and exception which can or may be had or taken to the many errors, uncertainties, and imperfections in the amended bill of complaint herein contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material for it to make answer unto, answering, saith:

First. This defendant admits that the allegations of the said amended bill of complaint with respect to the organization and existence of the defendant The Houston and Texas Central Railway Company and its ownership and possession of the lands and railway in that behalf mentioned in said bill are substantially true.

179 Second. This defendant does not know and is not informed, save by said amended bill of complaint, whether or not the complainants or any or either of them were or are stockholders of the Houston and Texas Central Railway Company at any time or in any amounts whatsoever.

Third. This defendant admits that the description of the mortgages or deeds of trust made and executed by the said defendant, The Houston and Texas Central Railway Company, as set forth in the article or subdivision of the said amended bill of complaint numbered 3, is substantially correct, but for greater certainty this defendant prays leave to refer to the originals of said several mortgages or deeds of trust or to true copies thereof when the same shall be produced.

This defendant, further answering, saith that it is a stranger to all and singular the matters stated and set forth in the article or subdivision of the said amended bill of complaint numbered 4 and does not know and is not informed, save by said amended bill of complaint, with respect to any of the allegations contained in said article or subdivision 4, except that this defendant is informed and believes that it is not true that the rights of holders of the stock of the Houston and Texas Central Railway Company were at any time sought or attempted to be shut out or barred, or that it was
180 at any time sought or attempted that the absolute control of
said company should be acquired by any syndicate, so that the railway of said company might be run in the interest of the syndicate or of the Southern Pacific Company or otherwise, or that in January, 1885, or at any time it was wrongfully or fraudulently contrived that coupons appertaining to the first-mortgage bonds of said railway company were cashed or taken up by the Southern Development Company or without notice to the holders thereof, or that Charles Dillingham was, at or before the time of his appointment as one of the receivers of the property of said railway company, a director of the Houston and Texas Central Railway Company.

This defendant admits the commencement of suits and the filing of bills of complaint in this court and the appointment of receivers, substantially as averred in said article 4 of said amended bill of complaint, but, for greater certainty, prays leave to refer to the records of said suit in this court.

Fourth. This defendant denies that none of said several mortgages permit the sale of said railway prior to the maturity of the principal of the bonds referred to in the said respective mortgages or either of them.

Fifth. This defendant denies that the terms and provisions of the main line first mortgage, Western division first mortgage,
181 consolidated mortgage, or general mortgage of said railway company are truly, fully, or correctly set forth in said amended bill of complaint, and prays leave to refer to the originals or true copies of said several mortgages for a true and correct statement of the several provisions thereof respectively.

Sixth. This defendant admits that on or about December 20th, 1887, an agreement of reorganization of said railway property was made, and for a proper description of the terms and provisions thereof it prays leave to refer to the original or to a true copy of said agreement of reorganization.

It denies that the negotiations in reference to said plan of reorganization were had mainly with Collis P. Huntington, but alleges on information and belief that said negotiations were had mainly between the representatives of the bondholders and the officers of the Houston and Texas Central Railway Company and of the Southern Pacific Company and the counsel of said representatives and of said several companies.

Seventh. This defendant admits the making and entry of a decree or judgment of the court in the consolidated cause referred to in said amended bill of complaint, and, for greater certainty as to the terms and provisions of said decree, it prays leave to refer to the original thereof on file in this court.

182 It denies that the said decree was entered by consent, or that the same fails to fix or that the court fails to find the amount due under the said several mortgages, or that it in no way fixes the amount to be paid by the company in order to prevent a sale of the mortgaged property.

It denies that there were any amounts of promissory notes representing proceeds of sale of lands which could have been properly *been* deducted from the amounts due under the mortgages.

Eighth. This defendant has no knowledge or is not informed save by said amended bill whether or not the defendant George E. Downs in making the purchase referred to in the 9th article of the amended bill was acting in the interest of any other person or persons whomsoever.

Ninth. It denies that the said decree was or is invalid or void for any reason whatsoever or beyond the power of the court to grant, or that there was no foundation for such decree or jurisdiction in the court to award it, or that the same was entered by consent or agreement or without investigation or adjudication by the court, or that it was the result of agreement simply or was procured by collusion or fraud or was or is fraudulent or part of any scheme alleged in the amended bill of complaint or in disregard of the provisions of the terms of the mortgage, or that the defenses interposed in
183 the suit were abandoned or withdrawn as a part of any such alleged scheme, or that such defenses were never submitted to the Court for adjudication or investigation or that no evidence was heard or offered to sustain the same, or that the decree was the result of any such alleged agreement, or that the stockholders of the Houston and Texas Central Railroad Company were not in any way advised or permitted to be informed of the transaction referred to in the said amended bill, or that their rights were not considered or protected in and by the said decree, or that said decree contains no finding by the court fixing the amount due from the Houston and Texas Central Railway Company under the said several mortgages or fixing the amount which said company was required to pay to redeem its franchises, property, and rights from the lien of the mortgages, or that the decree aforesaid contradicts any provisions of said several mortgages or is non-judicial or void for the reasons alleged in the amended bill of complaint or for any reason. On the contrary, this defendant alleges that the provisions of said decree in that behalf were and are in all respects regular and sufficient and in the usual form, and further alleges on information and belief that there were and are no person, persons, corporation or corporations both willing and able to pay even the amount of interest in default on said bonds secured by said mortgages re-
184 spectively, or to redeem the said railway and property from the liens of said several mortgages.

Tenth. This defendant has no knowledge or information sufficient to form a belief as to the names of any persons who are referred to in the article or subdivision of the amended bill of complaint numbered 11 as the "associates" of said Huntington, but it denies that said Huntington has, with or without any associates, filed or caused to be filed any articles of incorporation under the laws of Texas organizing or incorporating any railway company known as the Houston and Texas Central Railway Company for the purpose of operating the said or any railway or its franchises.

It alleges that the defendant Frederic P. Olcott, as the designated agent of the defendant The Central Trust Company, became the purchaser of a portion of the said line of railway at the foreclosure sale, and on information and belief has caused articles of incorporation to be filed under the laws of Texas for the purpose of creating a corporation to acquire the said line of railway so purchased by him known as the Houston and Texas Central Railway Company.

It denies that the notice of September 1st, 1889, referred to in the 11th article or subdivision of the amended bill of complaint, was issued by said Huntington or by said Huntington's authority or direction, but alleges that said notice was issued by the defendant
The Central Trust Company of New York, and that it was so
185 issued only under and in pursuance of the agreement of re-
organization. It denies that the assessment mentioned in the amended bill was wrongfully or fraudulently contrived or made up by said Huntington or his associates as a part of any scheme or plan such as alleged in said amended bill. It denies that said assessment was not fixed and determined by the Central Trust Company. It denies that no assessment has been fixed or determined by said Central Trust Company, or that the floating indebtedness of the Houston and Texas Central Railway Company is not correctly stated, or that said assessment was or is an attempt to compel the stockholders of the old company to turn over their stock to said Huntington or his associates or to purchase from said Huntington or his associates stock in the new company.

This defendant is informed and believes that during the period of the receivership referred to in the said amended bill of complaint, which has continued for nearly five years, the receivers have realized from the operation and management of the road sufficient moneys to pay the operating expenses of the road and needful and necessary repairs and to defray the expense of placing the road in a proper
condition for advantageous use and operation and to pay the
186 installment of interest on said first-mortgage bonds (main
line and Western division) maturing respectively on January 1st, 1885, and July 1st, 1885, and also the further sum of $1,008,000 on account of interest on said first-mortgage bonds, which is equal to five semi-annual instalments of interest on such first-mortgage bonds at five per cent. per annum, and also sufficient money to pay three instalments of interest at six per cent. per annum on the main

line and Western division consolidated mortgage bonds of said railway company; but it avers that the several instalments of interest due, unpaid, and in default during said period upon the outstanding mortgage obligations of the said Houston and Texas Central Railway Company amount in the aggregate to the sum of over $4,000,000 and upwards after deducting said sum of $1,008,000 and without including interest on defaulted interest or any interest on any of the Waco and Northwestern bonds; and this defendant further alleges that, under the plan or agreement of reorganization referred to in the said amended bill of complaint, the annual interest charge upon the property purchased by said Olcott under the plan is reduced from $1,380,000 to $869,000.

This defendant admits that the said railway is a valuable piece of property, but upon information and belief it denies that the interest of the stockholders of the old company therein is of 187 great value, or that the said railroad could be so operated as to pay all the interest due upon the bonds of the old company, together with its floating debt.

This defendant admits that in pursuance of the agreement of reorganization aforesaid the Central Trust Company of New York has fixed and determined the amount of the *pro rata* share in proportion to the whole outstanding capital of the old company of the amount required to discharge the floating debt of the company and to provide for the cash payments, charges, expenses, and liabilities incurred by it in carrying out the provisions of said agreement, which *pro rata* share must be provided by holders of stock of the old company in order to entitle them to receive stock of the new company, and that such *pro rata* share is $73 per share of old stock; but it denies upon information and belief that the floating indebtedness was not correctly stated, or that the amount thereof, to wit, $2,446,676.77, is greatly in excess of the amount properly due, or that the statement referred to in the amended bill was made up or fraudulently contrived by any person or persons for any improper purpose whatsoever or to compel the stockholders to relinquish any rights or to enable the Southern Pacific Company to acquire 188 the entire stock of the railway company on payment merely of the interest due and the costs of the reorganization.

It admits upon information and belief that the floating indebtedness is composed and made up in part of sums claimed to be due to various corporations it which said Huntington is a stockholder. It denies upon information and belief that said corporations or any of them or any person or persons have fraudulently contrived or permitted judgments to be had by any person or corporation against the old railway company.

This defendant alleges on information and belief that said *pro rata* share was ascertained and determined by the Central Trust Company of New York in good faith, and that the amount thereof was not more than sufficient to pay off and discharge the interest which is in default on the first-mortgage main line, Western division, bonds maturing July 1st, 1885, to July 1st, 1887, inclusive; the unpaid interest on the reduced basis from October 1st, 1887; the bonus given to the holders of the old first-mortgage bonds; the expenses of the reorganization, and the floating debts of the old company, the greater part of which debt is now in judgment.

Eleventh. This defendant upon information and belief denies that the interests of the stockholders of the old company have not been properly protected or that any collusive judgments have been entered in the suits referred to in the amended bill of complaint.

It admits that the complainants were not individually
189 parties to the foreclosure suit.

It alleges that the agreement of reorganization was made December 20th, 1887, and that it was made public about the same time, and that its terms and provisions were duly advertised in the public press as well as in financial journals and were matters of general knowledge among bankers ih the city of New York and persons engaged in transactions relating to railway securities.

That the said decree of foreclosure and sale was made and entered May 4th, 1888, and that its entry was announced in the public press and was well known in financial circles; that the sale of said railway and property was made on the 8th day of September, 1888, and was fully advertised and was also a matter of general knowledge; and this defendant upon information and belief alleges that the complainants at all times after the making of the said reorganization agreement well knew or had ample means of knowing the terms and provisions thereof, and that they knew or had an opportunity to know of said decree and the entry thereof and of said sale.

It denies that it was not until September, 1889, that complainants were not permitted to know of or have or read a copy of
190 said agreement, or that they were unable to obtain information or knowledge as to any facts relating to the reorganization, and upon information and belief it alleges that complainants

did not nor did any or either of them ever ask or apply to the Central Trust Company for any such information.

It denies upon information and belief that any transactions relative to the said railway or its reorganization were at any time wrongfully concealed from complainants, or that the rights of shareholders have been disregarded or violated in such reorganization.

And this defendant, while insisting that the said decree and the said plan or agreement of reorganization contained no improper provisions in any way impairing the rights of the complainants or of any of the stockholders of the old company, charges and alleges that the said complainants have unreasonably delayed the assertion of their supposed rights and have been guilty of laches in the premises, and alleges on information and belief that their attempt to delay and prevent the execution of the plan of reorganization is not made in good faith, but for the purpose of extorting from the bondholders and creditors of the old company some price and concession as a consideration for withdrawing their proceedings.

Twelfth. This defendant denies that the proposed new
191 mortgage bonds referred to in the said plan of reorganization
are about to be placed upon the market, except so far as may be so placed upon the market by the several persons who under the terms and provisions of said plan of reorganization are entitled to receive the same.

Thirteenth. This defendant admits *that at* the time of sale of the railway—was operated by receivers, as alleged in the 15th article or subdivision of the amended bill of complaint, and that Charles Dillingham was the special master commissioner conducting the sale.

This defendant admits the commencement of an action in the supreme court of the State of New York, as alleged in the 15th article or subdivision of the said bill of complaint, and that answers have been interposed in said action alleging the validity of the decree of sale and the right of the railway company to mortgage its property.

It admits that Charles Dillingham, E. W. Cave, J. J. Atkinson, and Charles Fowler are directors of the Houston and Texas Central Railway Company.

This defendant does not know and is not informed, save by said amended bill of complaint, whether or not any other of the matters alleged in the 15th article or subdivision of said bill of complaint are true. It denies that any of the persons named in said article are acting for their own interest in any matter destructive 192 of the company or of the rights of the shareholders of the old company, or that the complainants have ever made any effort in good faith or otherwise to obtain redress at the hands of the directors or shareholders of the company.

It denies that the complainants have any right to any injunction or to any equitable relief in the premises.

Wherefore this defendant prays for the judgment or decree of this court dismissing the said bill of complaint as against this defendant, and that this defendant may have and recover of the complainants its costs and expenses of this suit in that behalf most wrongfully sustained.

THE FARMERS' LOAN AND TRUST CO.,
By R. G. ROLSTON, *President.*

Attest: EDWIN S. MARSTON, *Secretary.*

TURNER, McCLURE & ROLSTON,
Solicitors for Defendant The Farmers' Loan & Trust Co.
HERBERT B. TURNER, *Of Counsel.*

Indorsed: No. 228. Equity. Filed April 21st, 1890. C. Dart, clerk.

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193 *Replication to Answer of Frederic P. Olcott. Filed May 5th,* 1890.

Circuit Court of the United States, Eastern District of Texas.

S. W. CAREY *et al.*, Complainants,
vs.
HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.*, Defendants.
} In Equity.

Replication of complainants to the answer of Frederic P. Olcott, one of defendants.

These repliants, saving and reserving unto themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their said amended bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by these replicants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not 194 herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said amended bill they have already prayed.

R. H. LANDALE,
Complainants' Solicitor.

Indorsed: No. 228. Equity. Circuit court of the United States, eastern district of Texas. S. W. Carey *et al.*, *vs.* Houston and Texas Central Railway Company *et al.* Replication to answer of Frederic P. Olcott. Filed May 5th, 1890. C. Dart, clerk, by W. L. Hanscom, deputy.

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195 *Replication to Answer of The Farmers' Loan and Trust Co. of New York. Filed May 5th*, 1890.

Circuit Court of the United States, Eastern District of Texas.

S. W. Carey *et al.*, Complainants,
vs.
Houston and Texas Central Railway Company *et al.*, Defendants.
} In Equity.

Replication of complainants to the answer of The Farmers' Loan & Trust Company of the City of New York, one of the defendants.

These replicants, saving and reserving unto themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their said amended bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and

insufficient to be replied to by these repliants; without this, that any other matter or thing whatsoever in the said answer
196 contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said amended bill they have already prayed.

R. H. LANDALE,
Complainants' Solicitor.

Indorsed: No. 228. Equity. Circuit court of the United States, eastern district of Texas. S. W. Carey *et al. vs.* Houston and Texas Central Railway Company *et al.* Replication to answer of the Farmers' Loan and Trust Co. of New York. Filed May 5th, 1890. C. Dart, clerk, by W. L. Hanscom, deputy.

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197 *Replication to the Answer of the Central Trust Co. of New York. Filed May 5th,* 1890.

Circuit Court of the United States, Eastern District of Texas.

S. W. Carey *et al.*, Complainants,
vs.
Houston and Texas Central Railway Company *et al.* Defendants.
} In Equity.

Replication of complainants to the answer of The Central Trust Company of the City of New York, one of the defendants.

These repliants, saving and reserving unto themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their said amended bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied to by these repliants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not 198 herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said amended bill they have already prayed.

R. H. LANDALE,
Complainant's Solicitor.

Indorsed: No. 228. Equity. Circuit court of the United States, eastern district of Texas. S. W. Carey *et al. vs.* Houston and Texas Central Railway Company *et al.* Replication to answer of the Central Trust Co. of New York. Filed May 5th, 1890. C. Dart, clerk, by W. L. Hanscom, deputy.

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201 *Separate Answer of Geo. E. Downs. Filed August* 11, 1890.

In the Circuit Court of the United States for the Eastern District of Texas. In Equity.

S. W. Carey *et als.*
vs.
The Houston & Texas Central Railway Company *et als.*
No. 228.

The separate answer of George E. Downs to the amended bill of complaint of S. W. Carey, Warren S. Sillcocks, J. Van Schaick, Julius A. Kohn, D. P. Ingraham, Jr., James Landale, George Wilson, and Andrew S. McClelland in the above-entitled suit.

This defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception or otherwise which can or may be had or taken to the many errors, uncertainties, and insufficiencies in the said bill of complaint contained, for answer thereunto or to so much thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, saith:

First. He has no knowledge and is uninformed, save by said bill, as to the allegations of said bill of complaint in respect to the residence or citizenship of the complainants or any of them.

Second. He denies that the Houston & Texas Central Railway Company is or since February 20, 1885, has been in posses-
202 sion of or engaged in the operation of any railway in the State of Texas or elsewhere, and he avers that the railway formerly operated by said Houston & Texas Central Railway Company has been at all times since said twentieth day of February, 1885, and is now in possession of and operated by receivers or a receiver thereof appointed by and acting under orders of this honorable court.

Third. He has no knowledge and is uninformed, save by said bill, as to the allegations contained in subdivision two of said bill or any of them.

Fourth. He admits upon information and belief that at or about the times of their respective dates the said company executed mortgages or deeds of trust, commonly known by the several designations referred to in subdivision three of said bill, and prays leave to refer to the originals or certified copies of such mortgages or deeds of trust when the same shall be produced in this suit, and denies each and every allegation of said bill in respect to the contents, purport, and effect thereof, except so far as upon reference to the said mortgages or deeds of trust or certified copies thereof the same shall be found to be correct and true.

Sixth. He admits upon information and belief that in and prior to the year 1883 a majority of the stock of the Houston & Texas Central Railway Company was owned by a Louisiana corporation known as Morgan's Louisiana and Texas Railroad and
203 Steamship Company, and that in the early part of the year 1883 the defendant Collis P. Huntington was interested in and was a large stockholder of the Southern Development Company, a California corporation, and that the said Huntington has been one of the vice-presidents and is now president of the Southern Pacific Company, a Kentucky corporation chartered in the year 1884, which has acquired the interest formerly held by the Southern Development Company in the stock of the Morgan Company.

Except as hereinbefore specifically admitted, he has no knowledge and is uninformed save by said bill as to the allegations contained in subdivision four of said bill down to and including the words "and became thus practically valueless," or any of them.

Upon information and belief he denies the allegations of said bill in respect to any contrivance for cashing or secretly taking up coupons from first-mortgage bonds, and each and every such allegation.

Seventh. In answer to the allegations of said bill in respect to the contents, provisions, and effect of the said several mortgages, he prays leave to refer to the originals of said mortgages or certified copies thereof when the same may be produced in this suit, and, in answer to the allegations of said bill of complaint in respect to the pleadings and proceedings in the various suits therein referred to, he prays leave to refer to the records thereof or to certified copies of the same when produced in this suit.

204 He avers upon information and belief that the consolidated cause referred to in the said bill was founded not alone upon the default made in January, 1885, in the payment of interest upon the bonds of the said railway company and interest falling due thereafter, but upon many alleged defaults of the railway company claimed to have taken place long before that date, and that it was claimed and asserted therein that by reason of such alleged defaults the bonds had matured and the principal had become due, but whether or not such claim or contention could lawfully or justly be maintained this defendant is unable to state.

He has no knowledge and is uninformed save by said bill whether or not, as matter of fact or law, the bonds of said company had legally matured and the principal thereof had become due at the time of the commencement of the suits mentioned in said bill or whether the principal of such bonds has matured or will only hereafter mature at later dates, as alleged in said bill, or when said bonds matured or will mature. He alleges upon information and belief that any retirement, payment, or exchange of income and indemnity bonds of this company which ever took place was made under and subject to the following, among other, provisions in respect to the partial exchange of bonds of that issue, as expressed in the general mortgage in the said bill referred to, viz.: "That when any of said prior lien bonds are purchased or taken up by exchange they shall not be cancelled or the
205 mortgage given to secure the payment thereof discharged
until such time as the trustee herein named has the entire amount of bonds purporting to be secured under any one of the before-recited mortgages," "and that all of the prior bonds received in exchange for bonds issued hereunder, except as last above provided, shall be held by the trustee herein named, as follows: First,

as an additional security for the payment of the principal and interest of the bonds issued under this deed; second, for the benefit and security of the Houston & Texas Central Railway Company, its successors and assigns," and that at the time of the entry of the decree of May 4, 1888, therein referred to, all such income and indemnity bonds had not been exchanged or tendered or offered for exchange, but one of such bonds still remained outstanding wholly unpaid and unexchanged, and the income and indemnity bonds, against which general mortgage bonds had been exchanged, were held by the Farmers' Loan & Trust Company, as trustee under such general mortgage, as an additional security for the payment of the outstanding general mortgage bonds. Upon the advice of his counsel he denies the allegation that none of the mortgages or deeds of trust of said railway company permit the sale of the railway prior to the maturity of the principal of the bonds referred to in the respective mortgages or either of them.

Eighth. He admits upon information and belief that on or about
or under the date of December 20, 1887, a reorganization
206 agreement was entered into by a majority of the holders of
mortgage bonds of the said Houston & Texas Central Railway Company (with the exception of holders of the Waco and Northwestern bonds), the Southern Pacific Company, and the Central Trust Company, and he prays leave to refer to the original of such agreement for the precise contents, purport, and effect thereof when the same may be produced in this suit. He has no knowledge and is uninformed save by said bill as to the allegations in said bill contained that the negotiations with reference to said plan of reorganization were had mainly with said Huntington, and that many meetings were held at his office to arrange the same; but he avers upon information and belief that the negotiation for and making of the reorganization agreement above referred to were well known and notorious and freely mentioned and commented upon in the public press, and that the complainants well knew at the time thereof, of the negotiations for or making of said agreement, and well knew at the time thereof that such agreement was pending and signatures of interested parties were being procured thereto, and knew of or might upon inquiry have known of the contents and provisions thereof.

Ninth. In answer to so much of said bill of complaint as relates to the decree made at the May term, 1888, by the United States circuit court for the eastern district of Texas he prays leave to refer to the original or a certified copy thereof when the same may be produced in this suit, and denies all allegations in said bill of 207 complaint contained in respect to the contents, purport, and effect thereof, except so far as by said original or certified copy of decree, reference thereto being had, the same may be found to be correct and true, and upon information and belief he denies that the same was a decree by consent, or that the same was entered in pursuance of any plan, agreement, or scheme, the same being, as this defendant is informed and believes, the judicial decree of the circuit court of the United States for the eastern district of Texas, made and entered in fulfillment of the judicial duties and functions with which said court was and is by law invested, and not otherwise; and he further avers upon information and belief that the complainants well knew of the entry of the said decree at or about the date of the entry thereof, and that the entry of such decree was well known and notorious and mentioned and commented upon at the time in the public press. He prays leave to refer to the proofs on file in said consolidated suit to show more fully and accurately their extent, purport, and effect. He avers upon information and belief that the defenses alluded to in the answer of the defendant railway company in said suit arose upon the mortgages which were in evidence therein and which constituted the only testimony which the railway company could produce in support of such defense. He denies that the decree fails to fix or the court fails to find the amount due under the several mortgages, or that it in any way fixes the amount to be paid by the company in order to prevent a sale of the mortgaged property as alleged.

208 He denies upon information and belief that there were any amounts in the hands of trustees, or promissory notes representing proceeds of land sales, or amounts in the hands of receivers which should have been deducted from amounts mentioned and referred to in the decree.

He avers that at the sale made under and in pursuance of such decree on the 8th day of September, 1888, the property covered by the Waco and Northwestern division first mortgage, referred to in said decree, was purchased, subject to such mortgage, by this defendant, at and for the sum of $25,000, one Ernest B. Kruttschnitt acting as attorney for this defendant in making said bid and purchasing said property for and on behalf of this defendant. The other property sold at such sale was, as this defendant is informed and believes, purchased by defendant Frederic P. Olcott for the sum of $10,580,000. The property purchased by this defendant included all the property covered by the Waco and Northwestern division first mortgage, as prescribed in said decree under which such sale was made, including franchises and land grants covering, as was then supposed, about 277,200 acres of land; but such purchase was made subject to said first mortgage, though without any personal assumption of the payment of said first mortgage by the purchaser, and the title of the Houston & Texas Central Railway Company to such land has since been attacked by the attorney general of the State of Texas, as this defendant is informed 209 and believes. He denies that the said purchase was made in pursuance of said plan of reorganization, the holders of Waco and Northwestern division bonds having, in fact, refused to participate to the required extent in the reorganization. He admits upon information and belief that the Mr. Kruttschnitt above referred to, who is a well-known lawyer of the City of New Orleans and a member of the firm of Farrar, Jonas & Kruttschnitt, of that city, was, as a matter of fact, one of the attorneys for the Southern Development Company in the suit which it commenced against the Houston & Texas Central railway in or about January, 1885. He denies that in making said purchase he was acting for or in the interest of said Huntington and his associates, or that they were the real purchasers of said property, and he denies that any person or party, other than himself and the Pacific Improvement Company, ever had or acquired any interest in such purchase or the property so purchased by him.

He denies that he became a party to the suit in which said decree for the sale of the said property was entered by reason of said purchase, as is alleged in said bills, and he submits that his only legal relation to said suit was that of purchaser after the final decree was entered, and that as such he has nothing to do with the regularity of the proceedings therein prior to the final decree and sale.

Tenth. Upon and according to the best of his knowledge, information and belief on the subject he denies the allegations contained in the first two paragraphs of subdivision 10 of said 210 bill, being the portions of said subdivision to and including the words "and is non-judicial and void," and each and every of such allegations; and upon information and belief he denies that the said decree was without jurisdiction or for any cause was invalid or void, or that there ever was any scheme to acquire possession of the road in the interest of the defendant Huntington or the Southern Pacific Company without regard to the rights or interests of the holders of stock of said Houston & Texas Central Railway Company or in disregard of any provisions or terms of the mortgage or otherwise howsoever, or that the decree above referred to was procured by any collusion or fraud or was a part of any scheme to acquire possession of the road in the interest of the defendant Huntington or the Southern Pacific Company or otherwise howsoever.

This defendant took no part in said suit and had not at the time of his aforesaid purchase any knowledge or information as to the mode in which said suit had been conducted, nor the evidence upon which the court acted, nor the circumstances attending the decision of the court, nor has he any knowledge, information or belief in the premises, except so far as hereinbefore stated.

He found a suit pending in the circuit court of the United States for the eastern district of Texas between plaintiffs entitled to sue and a corporation entitled to stand in judgment as owner and legal representatives of the property in contestation, and a final decree therein unappealed from and ripe for execution, and, relying
211 upon such decree, purchased the said property as aforesaid.

Eleventh. He denies upon information and belief the allegations contained in subdivision 11 of said bill and each and every of them.

He has no knowledge and is uninformed, save by said bill, as to the allegations contained in the first two paragraphs of subdivision 12 of said bill or any of them, and upon information and belief denies the allegations contained in the last three paragraphs of said subdivision and each of them.

Twelve. He admits upon information and belief that the complainants were not parties to the consolidated cause or any of the other suits in Texas in respect to the said property. Except as aforesaid he denies upon information and belief the allegations contained in subdivision 13 of said bill and each of them.

Thirteenth. He has no knowledge and is uninformed, save by said bill, as to the allegations contained in subdivision 14 of said bill or any of them.

Fourteenth. He denies upon information and belief that the directors of the Houston & Texas Central Railway Company acted or are acting with or in the interest of Collis P. Huntington or *or* any syndicate of his or the Southern Pacific Company or otherwise than

in the interest of the Houston & Texas Central Railway Company, or had or have any interests inimical to those of the complainant or other stockholders similarly situated, or permitted the entry of the
decree therein referred to or suffered the property of the com-
212 pany to be disposed of as charged in the bill, and each and
every allegation on that behalf in said bill contained. He has no knowledge and is uninformed, save by said bill, as to the effect or result of any notice to the board of directors or any of them to institute suit or proceed to vacate said decree and the sale thereunder or appeal therefrom. He denies upon information and belief that the directors, or those who control the action of the corporation, are acting for their own interests or in a manner destructive of the company or of the rights of the shareholders, or that the complainants have made any effort to obtain redress at the hands of the directors or shareholders of the company. As to the pleadings and proceeding- in the action of the supreme court of the State of New York, mentioned in subdivision 15 of said bill, he prays leave to refer to the record, pleadings and proceedings in said cause, so far as material; but he denies upon information and belief that the said Huntington, either with or without associates, caused the interposition of any answer therein except his own.

Fifteenth. He denies upon information and belief that the complainants are entitled to redress, as alleged in said bill, or to any redress whatever in the premises, or that they have suffered any wrong or injury by reason of any of the matters and things in said bill alleged or referred to.

Sixteenth. He avers that the said decree of the circuit court of the United States for the eastern district of Texas was duly and
regularly entered on or before the 4th day of May, 1888, in the
213 consolidated cause in which said decree is entitled; that the
said court had in said cause jurisdiction of the parties thereto and of the subject-matter thereof; that the decree was duly and regularly made and entered upon the pleadings and upon testimony taken in the cause and embodied the final determination and adjudication of the said court in respect to the matters at issue therein, and that the same was and is wholly operative and effective and a final adjudication in respect to the matters therein determined, subject only to such appeal as might have been duly or seasonably taken therefrom; that afterward and in pursuance of the provisions and reqirements of the said decree, and after the advertisement

and publication therein directed and in all respects in the manner therein prescribed, there was publicly offered for sale under said decree at the time and place therein designated therefor, among other things, all the property and premises, rights, privileges, immunites, and franchises of every kind and description covered by the Waco and Northwestern first mortgage, the same being offered as one parcel and as an entirety subject to the first mortgage on said property, dated June 6, 1873, but without any personal assumption of the payment of said first mortgage on the part of the purchaser; that upon such offer of the same for sale this defendant, through his attorney, duly bid therefor, and his bid, being the highest and best bid for the same, was duly accepted by the master commissioner appointed under said decree, and, as required by said
decree, this defendant thereupon paid the amount of his said
214 bid to the said special master commissioner; that afterward,
upon report of such sale being duly made to the said circuit court of the United States for the eastern district of Texas, such sale was duly confirmed by decree to that effect entered on or about the 4th day of December, 1888, copy whereof is hereunto annexed, marked "Exhibit A," and thereupon, in pursuance of the directions and decree of the said circuit court for the eastern district of Texas, the property and premises, rights, privileges, immunities, and franchises so purchased by this defendant were conveyed to him by deed bearing date the 18th day of January, 1889, copy of which is hereunto annexed, marked "Exhibit B;" that the same was immediately after its delivery recorded in the counties where the property mentioned therein was situated, and that by virtue of such purchase under said decree and such conveyance this defendant has become and is the owner of all the property and premises, rights, privileges, immunities, and franchises so sold at said sale and so purchased by him, and he is advised and believes that this court has no jurisdiction to review said decree or to adjudge the same or the sale or conveyance thereunder to this defendant to be in anywise illegal or void, or, so far as the defendant is concerned, to grant to the plaintiffs any of the relief demanded in their complaint.

Seventeenth. He alleges that the entry of the decree of foreclosure and sale so made and entered on the 4th day of May, 1888, was
extensively announced in the public press and was perfectly
215 well known in financial circles in the city of New York and
elsewhere; that the sale thereunder made on the 8th day of

September, 1888, was also fully advertised and a matter of general knowledge. Upon information and belief the defendant alleges that the complainants at all times after the making of the reorganization agreement well knew the terms and provisions thereof; that they knew of said decree and the entry thereof and of said sale, and he is advised and charges that if the complainants might otherwise have any right whatever to attack such decree or sale (which, however, he denies) they have unreasonably delayed the assertion of any such right and been guilty of laches therein.

And respondent submits that the complainants' action is stale and ought not to be entertained in a court of equity in relation to the matters complained of, notwithstanding the pretended excuses made in said bill, which are not true in fact nor sufficient in law to relieve them from the effect of their laches; and he alleges on information and belief that the present proceeding of the complainants is not taken in good faith, but for the purpose of extorting from bondholders and creditors of the company or from the Southern Pacific Company some price or concession as a consideration for withdrawing their proceeding.

Respondent believes and charges upon information and belief that the complainants never thought of disputing the validity of said decree and the sales made under it, although they were perfectly well acquainted with the whole matter, until they found 216 they could not force themselves into said new organization or sell their stock in the Houston & Texas Central Railway upon terms dictated by themselves.

Eighteenth. He further submits to this honorable court that none of the matters in said amended bill of complaint mentioned and complained of are matters in respect of which complainants are entitled to the relief prayed for or any relief herein, and this defendant prays for the same benefit of defense hereto as if he had demurred to said amended bill.

And he denies all unlawful confederation and fraud in said amended bill charged; without this, that any other matter or thing material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered unto, confessed, traversed, and avoided or denied is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

WM. GRANT, *Solicitor.*
For GEO. W. DOWNS, *Def't.*

J. D. ROUSE, *Of Counsel.*

Endorsed : No. 228. Eq. Separate answer of Geo. E. Downs. Filed Aug. 11, 1890. C. Dart, clerk, by W. L. Hanscom, deputy. United States circuit court, eastern district of Texas. No. 228. In equity. S. W. Carey *et als. versus* Houston & Texas Central 217 Railway Company *et als.* Rouse & Grant, attorneys for Geo. E. Downs.

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218 Exhibit " A " Referred to in the Foregoing Answer.

United States Circuit Court in and for the Eastern District of Texas, at Galveston, Sitting in Equity.

Nelson S. Easton and James Rintoul, Trustees, and The Farmers' Loan and Trust Company, Trustees, *against* The Houston and Texas Central Railway Company *et als.*	No. 198, Chancery Docket. Order Confirming Sale of Railway Franchises, etc.

This cause came on to be heard at this term on the application of the Farmers' Loan and Trust Company to confirm the sales herein made on the 8th day of September, 1888, under the decree of date the 4th day of May, 1888.

Whereupon and on consideration whereof it is ordered, adjudged, and decreed that the report herein filed on September 26, 1888, by Charles Dillingham, special master commissioner, be confirmed and approved.

It is accordingly further ordered, adjudged, and decreed that the adjudications made by the said Charles Dillingham, special master commissioner, on the 8th day of September, 1888, of the properties described in his report to Frederic P. Olcott and to George E. Down be respectively confired, approved, and made the judgment of this court.

It is further ordered, adjudged, and decreed that the said master commissioner do execute and deliver in due form of law a deed to the said Frederic P. Olcott and a deed to the said George E. 219 Down respectively of the respective property purchased by them at said sale, in which said deeds the Houston and Texas Central Railway Company and the various trustees respectively shall join with the said master commissioner, as provided in the final decree herein, entered on the 4th day of May, 1888.

In open court, December 4, 1888.

DON A. PARDEE,
Circuit Judge.

Indorsements: No. 198. Equity. Nelson S. Easton *et. al.*, trustees, *v.* The Houston & Texas Central Railway Co. *et al.* Order confirming sale railway, franchises, etc. Filed December 4, 1888. C. Dart, clerk.

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220 EXHIBIT "B" Referred to in the Foregoing Answer.

This indenture made and entered into this eighteenth day of January, A. D. 1889, by and between Charles Dillingham, as special master commissioner, Nelson S. Easton, and James Rintoul, as trustees of the main line first mortgage of the Houston & Texas Central Railway Company, dated July 1, 1866, and of the Western division first mortgage of said railway company, dated December 21, 1870; the Farmers' Loan and Trust Company, as truestee of the main line and Western division consolidated mortgage, dated October 1, 1872, and of the general mortgage of said railway company, dated April 1, 1881, and of the Waco and Northwestern division consolidated mortgage, dated May 1, 1875; Benjamin A. Shepherd, as sole surviving trustee of the income and indemnity mortgage of said railway company, dated May 7, 1877; and the Houston & Texas Central Railway Company, a corporation of the State of Texas, parties of the first part, and George E. Downs, of the City— Brooklyn, in the State of New York, party of the second part, witnesseth: That

Whereas, a certain decree was rendered in the circuit court of the United States for the eastern district of Texas, in the fifth circuit, on the fourth day of May, 1888, in a certain cause then pending in said court under title of "Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, *v.* The Houston & Texas Central Railway Company, *et als.*," and bearing the number 198, consolidated cause, on the chancery docket 221 of said court, wherein and whereby it was ordered, adjudged, and decreed that the said The Houston & Texas Central Railway Company, should, within thirty days from the date thereof, pay into said court certain sums of money which by said decree were then adjudged to be due to the holders of certain bonds and coupons secured by certain deeds of trust or mortgage described in said decree ; and it was further adjudged and decreed, that in default of such payments all of the mortgaged premises and property, real, personal, or mixed, rights, privileges, immunities, and franchises hereinafter more particularly described, should be sold without appraisement or redemption by Charles Dillingham, the special master commissioner therein named, at public auction, in the manner and upon the terms specified in said decree, at the front door of the United States post-office building, in the city of Galveston, in the State of Texas, on such day as the special master commissioner should appoint, after first giving notice of the time and place of such sale for the time and in the manner required by said decree ; and

Whereas, the said Houston & Texas Central Railway Company wholly failed to pay the sums of money adjudged by said decree to be due, within the time ordered, or otherwise, and thereupon said Charles Dillingham, as such special master commissioner, gave due notice of the time and place of such sale, in accordance with the direction of said decree, and announced that he would sell said mortgaged premises and property at the front door of the 222 United States post-office building in said city of Galveston on the 8th day of September, 1888, in accordance with the directions of said decree ; and whereas, pursuant to said decree, the said special master commissioner did, at the time and place last above specified, offer for sale at public auction the said mortgaged premises and property, and thereupon George E. Downs became the highest bidder for the property and premises hereinafter described, at the sum of $25,000, and was thereupon adjudicated by said special master commissioner to be the purchaser thereof ; and such sale and bid having been by said special master commissioner duly reported to the said court, and having been in all things confirmed by the said court by an order of confirmation duly entered in the said cause on the 4th day of December, 1888 ; and the said purchaser having fully complied with the terms of said decree, and the said special master commissioner having been by said order or confirmation further directed to execute and deliver to said purchaser a deed of the property so sold and purchased as aforesaid;

Now, therefore, in consideration of the premises and for purpose of giving full effect to such sale, and in execution of the decree and order of said court above set forth, and in consideration of the payment made by the said purchaser, in accordance with such decree and order, the said Charles Dillingham, special master commissioner as aforesaid, hath granted, sold, and conveyed, and doth by these present grant, sell, and convey, unto George E. Downs, of the city of Brooklyn, in the State of New York, all and singular
223 the following-described property, to wit:

All the property and premises, rights, privileges, immunities, and franchises of every kind and description covered by the Waco and Northwestern first mortgage of the said Houston & Texas Central Railway Company, dated June 16, 1873, including securities which are the proceeds of land sales, and including all the Waco and Northwestern division of the railway of the said railway company, beginning on the main line at the town of Bremond, in Robertson county, and passing through the counties of Robertson, Falls, and McLennan, to the town of Ross, a distance of about fifty-eight (58) miles, including all the roadways, side tracks, depots, stations, water tanks, section-houses, round-houses, turnouts, rolling stock, equipments and materials, tenementes and hereditaments, rights and franchises; and also six thousand (6,000) acres of land per mile of the completed road of said division, saving and excepting such portion of said lands as have been heretofore, and prior to May 4, 1888, sold to other purchasers, and including all notes given to secure the credit portion of the price of land sales, such lands so included in this deed being situated in the counties of Childress, Cottle, Garza, Hardeman, Kent, and Wilbarger, and being estimated to amount, exclusive of the lands pertaining to the railroad, to about two hundred and seventy-seven thousand two hundred (277,200) acres.

The property hereby conveyed included all the lands, lots, and properties particularly described in certain schedules, recorded in each of the counties above named, designating the lands sit-
224 uated in each county, covered and conveyed by deed of trust to the Farmers' Loan and Trust Company, dated June 16, 1873, and also particularly described in certain other schedules on

file with the clerk of the circuit court of the United States, at Galveston, as part of the record in said consolidated cause, No. 198.

To have and to hold the said property with the appurtenances, rights, and franchises, and each and every part thereof so sold and hereinbefore described, unto the said George E. Downs, his heirs, executors, administrators, and assigns forever, free from any claim or demand whatsoever on the part of the Houston & Texas Central Railway Company, its creditors (except as hereinafter stated), or its successors or assigns, as well as from any claim or demand of the Farmers' Loan and Trust Company, as trustee (except as hereinafter stated), or of Nelson S. Easton and James Rintoul, as trustees, or of Benjamin A. Shepherd, as trustee, or any other persom whomsoever; but subject to said Waco and Northwestern first mortgage, dated June 16, 1873, but without any personal assumption of the payment of said first mortgage on the part of the purchaser, and also subject to the right which the court aforesaid reserves to charge upon said property, or any part thereof, the payment of any amounts that may be found and determined by the court to be due and payable by reason of intervening petitions filed in this cause prior to the fourth day of May, 1888, and to be entitled to priority over the mortgage debts to the Farmers' Loan and Trust Com-
225 pany, trustee, to Easton and Rintoul, trustees, and to Benjamin A. Shepherd, trustee, above referred to.

The price and consideration of this sale is the sum of twenty-five thousand dollars ($25,000), which said sum has, by the purchaser, George E. Downs, been paid to Charles Dillingham, special master commissioner, aforesaid, as prescribed in said decree, the receipt of which said sum is hereby acknowledged, and acquittance given therefor to the said George E. Downs. And now, in obedience to the terms of the said final decree of date May 4, 1888, entered in said cause, and in obedience to the said order of confirmation entered in said cause on the 4th day of December, 1888, and as a further assurance to the purchaser, the Farmers' Loan and Trust Company, trustee, of the main line and Western division consolidated mortgage, and of the general mortgage of the Houston & Texas Central Railway Company, by R. G. Rolston, president; Nelson S. Easton, trustee, and James Rintoul, trustee, of the city of New York; Benjamin A. Shepherd, surviving trustee, of the city of Houston; and the Houston & Texas Central Railway Company, by A. C. Hutchison, its president, hereby intervene and join with the said Charles Dillingham, special master commissioner, in this deed of

conveyance, and do by these presents and for the consideration
above expressed, grant, release, and convey unto the said George E.
Downs, to have and to hold unto him, his heirs, executors, admin-
istrators, and assigns forever, free from the claims of any
226 person whomsoever lawfully claiming or to claim the same,
or any part thereof, all of their respective rights, titles, in-
terests, claims, and demands of every kind and nature whatsoever
in and to the above-described premises and property, and every
part and portion thereof. Provided, however, that nothing in this
deed shall be considered as any waiver or extinguishment of the
rights of the Farmers' Loan and Trust Company as trustee of the
said first mortgage on the Waco and Northwestern division of said
railway, dated June 16, 1873; and bearing upon all the property
above granted and conveyed to George E. Downs, the said George
E. Downs, as hereinbefore provided, purchasing the said property
subject to the lien of said mortgage without any personal assump-
tion thereof.

Executed in three duplicate originals, each complete and all the same as one.

In witness whereof, the said Charles Dillingham, special master commissioner, and the said Nelson S. Easton and James Rintoul, trustees, and Benjamin A. Shepherd, trustee, have hereunto set their respective hands and seals; and the said Farmers' Loan and Trust Company and the said The Houston & Texas Central Railway Company have caused their respective corporate seals to be hereunto affixed and these presents to be signed by their respective presidents and attested by their respective secretaries the day and year first above written.

228 75½ to 84.

The Separate Answer of the Houston & Texas Central Railway Co. Filed August 25th, 1890. C. Dart, Clerk.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

S. W. CAREY *et al.*
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.* }

The separate answer of the Houston and Texas Central Railway Company, styled in the bill The Houston & Texas Central Railway Company (No. 1), to the amended bill of complaint of S. W. Carey and others in the above-mentioned suit.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and insufficiencies in the said bill of complaint contained, for answer thereunto or to so much thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, saith:

First.

229 It has no knowledge and is uninformed, save by said bill, as to the allegations of said bill of complaint in respect to the residence or citizenship of the complainants or any of them.

Second.

It denies that it is, or since February 20th, 1885, has been, in possession or engaged in the operation of any railway in the State of Texas or elsewhere, and it avers that the railway formerly operated by it has been at all times since said 20th day of February, 1885, and is now in possession of and operated by receivers or a receiver thereof, appointed by and acting under orders of this honorable court.

Third.

It has no knowledge and is uninformed, save by said bill, as to the allegations contained in subdivision 2 of said bill, or any of them.

Fourth.

It admits that at or about the times of their respective dates it executed mortgages or deeds of trust commonly known by the several designations referred to in subdivision 3 of said bill, and prays leave to refer to the originals or certified copies of such mortgages or deeds of trust when the same shall be produced in this suit, and it denies each and every allegation of said bill in respect to the contents, purport, and effect thereof, except so far as, upon reference to the said mortgages or deeds of trust or certified copies thereof, the same shall be found correct and true.

230

Fifth.

It admits that in and prior to the year 1883 a majority of its stock and a controlling interest in the company (if and so far as the ownership of a majority of the stock thereof conferred the same, but not otherwise) was owned by a corporation created and existing under the laws of the State of Louisiana, known as Morgan's Louisiana and Texas Railroad and Steamship Company, and it admits upon information and belief that in the early part of the year 1883 the defendant Huntington was interested in and a large stockholder of the Southern Development Company, a corporation organized under the laws of the State of California.

Upon information and belief it denies that the said Huntington, with his associates, controlled the said Southern Development Company in any other sense than that the directors of the said company were and are elected by the votes of the holders of a majority of the capital stock of said corporation, and said Huntington, with those who were his associates in the sense of being fellow-stockholders with him in the corporation, had thus, from time to time, elected the board of directors thereof.

It denies upon information and belief each and every allegation contained in the first paragraph of subdivision 4 of said complaint (being the paragraph ending with the words "thus obtaining control of said last-named company"), except so far as the same are hereinbefore in this subdivision of this answer specifically admitted.

231 Sixth.

It avers that the facts in respect to the relations between the Southern Development Company, Morgan's Louisiana and Texas Railroad and Steamship Company (hereinafter called the Morgan Company), and this company were as follows and not otherwise: The late Charles Morgan having become, in or about the year 1877, the owner of a majority of the capital stock of this company (paying therefor about —— per share), afterwards and shortly before the time of his death transferred such majority of said capital stock to the Morgan Company, which had been formed for the purpose of acquiring the important railroad and steamship properties theretofore owned by Charles Morgan individually. Some years after the death of Mr. Morgan, and in the spring of the year 1883, a contract was made between the Southern Development Company and the administratrix of the estate of and donees of Charles Morgan for the purchase by the Southern Development Company of upwards of a majority of the capital stock of the Morgan Company. This contract was fulfilled by both parties thereto, and the Southern Development Company acquired thereunder upwards of a majority of the capital stock of the Morgan Company. It is informed and believes that the acquisition of stock of the Morgan Company, a corporation which owned an important line of steamships between New York, New Orleans, Galveston, and other ports, and a railroad in the State of Louisiana extending from New Orleans to a junction with the Louisiana Western Railroad Company, a Louisiana 232 corporation in which the Southern Development Company was a large stockholder, was the controlling inducement for such purchase of the stock of the Morgan Company, and the fact that the Morgan Company owned a majority of the stock of this company formed but an unimportant and wholly collateral inducement to the Southern Development Company to make such purchase.

Seventh.

It admits that the Southern Pacific Company was chartered under the laws of the State of Kentucky, in the year 1884, and that the defendant Huntington was vice-president, and it avers that he is now president thereof. It denies upon information and belief the allegation in said bill of complaint contained that the said Huntington, with his associates, own a majority and controlling interest in the said Southern Pacific Company in any other sense than that the directors of the company were and are elected by votes of a majority of the capital stock of said corporation, and the said Huntington, with those who are his associates, in the sense of being fellow-stockholders with him in the corporation, have thus, from time to time, elected the board of directors thereof. It admits upon information and belief that the Southern Pacific Company acquired the interest formerly held by the Southern Development Company in the stock of the Morgan Company, but it denies that the 233 Southern Pacific Company has been able to or has controlled this company or named or elected its officers or directors otherwise than that the Morgan Company, a majority of whose stock was owned by the Southern Pacific Company, has owned a majority of the stock of this company and been entitled to exercise and has exercised the rights conferred upon it by reason of such stock ownership.

It denies that at the time — that behalf in the complaint referred to the Houston and Texas Central railway was the most reliable railway in the State of Texas. On the contrary, it avers that on account of the large number of accidents resulting from the condition of its track and the large death losses resulting therefrom it had acquired the sobriquet in Texas of the "Angel-maker." It denies the allegation in the bill of complaint contained that the land grants from the State of Texas then owned by it amounted to 5,500,000 acres, and upon information and belief it avers that such land grants, as then understood, did not amount to upwards of 4,500,000 acres, and it avers upon information and belief that the rights and claims of said railway company to important portions of said land grants are now disputed by the attorney general of the State of Texas, who has taken proceedings to prevent its obtaining patents from the State therefor.

It denies upon information and belief each and every allegation in the bill of complaint contained as to any syndicate's obtaining control of or acquiring a controlling interest in the Houston & Texas Central railway. It denies upon information and 234 belief that through any acts, suits, or proceedings in said bill of complaint referred to or otherwise any rights of holders of the stock of said company were sought or attempted to be shut out or barred, or that any syndicate ever acquired or sought or attempted to acquire the absolute control of the company, so that the railway might be run solely or at all in the interest of said syndicate or the Southern Pacific Company, or that any effort was made to deprive the holders of the stock of the company of or to in anywise impair any rights which they had or might possess in, to, or in respect to the said company or its stock.

It denies that said Huntington and his associates ever obtained any control of or interest in the Houston and Texas Central Railway Company save as they were interested in the stock of the Southern Development Company or the Southern Pacific Company, and as said Southern Development Company or Southern Pacific Company were interested in the stock of said Morgan Company and as said Morgan Company was interested in the stock of this company, all as stated above. It has no knowledge and is uninformed save by said bill as to the price paid by the complainants or any of them for any of its stock which may have been purchased by them or any of them. It denies the allegation in said complaint contained that in January, 1885, when the holders of first-mortgage bonds, main line and branches, presented their coupons for payment it was fraudulently and wrongfully contrived by said Huntington and his associates that said coupons were cashed and secretly
235 taken up by the Southern Development Company without
notice to the holders thereof. It denies that there was any contrivance, secresy or concealment about or in connection with the transaction, the fact in respect thereto being that this company was wholly without resources wherewith to pay such coupons or any part thereof, and the Southern Development Company voluntarily offered to purchase the coupons at their par or face value from any coupon-holders who should elect to sell the same and execute bills of sale to it thereof; some coupon-holders elected to sell and others refused to do so, and each coupon-holder determined for himself which course he chose to pursue in reference thereto.

It admits that the market price of the stock of this company gradually declined from about par in 1881, or thereabouts, to about one dollar per share in 1889, but it is unable to state whether or not the particular statements in regard to the *course* of such decline contained in said bill are accurate. The cause, however, of such decline in market value between 1881 and 1884 and of the inability of this company to provide for or to pay the interest which fell due on the first day of January, 1885, *are* simple and obvious. During the years 1881 to 1884 this company in each and every year earned very much less than the interest upon its bonded debt after paying the expenses of operation and betterments, taxes and interest on floating debt, such deficit being substantially as follows :

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1881 :	1882 :	1883 :	1884 :
$723,836.51	$430,177.16	$570,979.25	$991,481.44

The high prices at which the stock was sold in or about 1881 seem to have been predicated upon an exaggerated estimate of the value of the company's land grants and an ignoring of the cost and expense of necessary repairs and betterments to the property. The depreciation of the stock since 1885 has, no doubt, been largely predicated upon the fact that the earning of the property during the receivership, viz., from 1885 to 1888, have also been insufficient to provide for the payment of interest on the bonded debt, the excess remaining for providing for interest on the bonded debt during the years 1885 to 1888 being, as this defendant is informed and believes, as follows :

1885 :	1886 :	1887 :	1888 :
$492,953.63	$650,406.75	$243,540.26	$265,300.07

while the interest accruing on the bonded debt as the same existed prior to reorganization was $1,193,000, and the reduced interest under the plan of reorganization (after securing all reductions to which the bondholders would assent) is $868,993.

Eighth.

In answer to the allegations of said complaint in respect to the pleadings and proceedings in the various suits therein referred to it prays leave to refer to the records thereof or to certified
237 copies thereof when produced in this action ; and in answer to the allegations of said complaint in respect to the contents provisions and effect of the several mortgages therein referred to it prays leave to refer to the originals of said mortgages or certified copies thereof when the same may be produced in this action.

Ninth.

This defendant avers upon information and belief that the consolidated cause referred to in the said complaint was founded not alone upon the default made in January, 1885, in the payment of interest on the bonds of the said railway company and interest falling due thereafter, but upon many alleged defaults of the railway company claimed to have taken place long prior to that date, and that it was claimed and asserted therein that by reason of such alleged defaults the bonds had matured and the principal had become due, but whether or not such claim or contention could lawfully and justly be maintained this defendant is unable to state.

It has no knowledge nor information sufficient to form a belief whether or not, as a matter of fact or law, the bonds of this company had legally matured and the principal thereof had become due at the time of the commencement of the suits mentioned in said bill or whether the principal of such bonds has matured or will only hereafter mature at later dates, as alleged in said bill. It alleges upon information and belief that any retirement, payment, or exchange of income and
238 indemnity bonds of this company, whichever took place, was made under and subject to the following, among other, provisions in respect to the partial exchange of bonds of that issue as expressed in the general mortgage in the said bill referred to, viz: "That when any of said prior lien bonds are purchased or taken up by exchange they shall not be cancelled or the mortgage given to secure the payment thereof discharged until such time as the trustee herein named has the entire amount of bonds purporting to be secured under any one of the before recited mortgages," * * * and "that all of the prior bonds received in exchange for bonds issued hereunder, except as last above provided, shall be held by the trustee herein named as follows: First, as an additional security for the payment of the principal and interest of the bonds issued under this deed; second, for the benefit and security of the Houston and Texas Central Railway Company, its successors and assigns," and that at the time of the entry of the decree of May 4, 1888, therein referred to, all such income and indemnity bonds had not been exchanged or tendered or offered for exchange, but one of such bonds still remained outstanding wholly unpaid and unexchanged, and the income and indemnity bonds, against which general mortgage bonds had been exchanged, were heldby the Farmers' Loan and Trust Company, as trustees under such general mortgage, as an additional security for the payment of the outstanding general mortgage bonds. Upon the advice of its counsel it denies the allegation that none of the mortgages or deeds of trust of said railway company permit the sale of the railway prior to the maturity of the principal of
239 the bonds referred to in the respective mortgages or either of them.

Tenth.

It admits upon information and belief that on or about or under the date of December 20, 1887, a reorganization agreement was entered into by a majority of the holders of mortgage bonds of this company (with the exception of holders of the Waco and Northwestern bonds), the Southern Pacific Company, and the Central Trust Company, and in answer to the allegations of said bill in respect to the contents, purport, and effect thereof it prays leave to refer to the original or a copy of such agreement when the same may be produced in this suit. It avers that prior to the making of such agreement it had been freely stated that the counsel for the Farmers' Loan and Trust Company expected to procure in April or May, 1888, a decree for the foreclosure of this company's general mortgage and a sale of the property thereunder, and it was uncertain whether their application for a decree of foreclosure and sale at that time could be postponed or delayed or successfully resisted. It avers upon information and belief that the negotiations for and making of the reorganization agreement above referred to were well known and notorious and freely mentioned and commented upon in the public press, and that the complainants well knew at the time thereof of the negotiations for or making of said agreement and well knew at the time thereof that such agreement was pending and signatures of interested parties were being procured therein. 240

Eleventh.

In answer to so much of the said bill of complaint as relates to the decree made at the May term, 1888, of the United States circuit court for the eastern district of Texas, it prays leave to refer to the original or a certified copy thereof when the same may be produced in this suit, and denies all allegations in said bill contained in respect to the contents, purport, and effect thereof, except so far as by said original or certified-copy decree, reference thereto being had, the same may be found to be correct and true. Upon information and belief it denies that the same was a decree by consent, or that the same was entered in pursuance of any plan, agreement, or scheme, the same being, as this defendant is informed and believes, the judicial decree of the circuit court of the United States for the eastern district of Texas, made and entered in fulfilment of the judicial duties and functions with which said court was and is by law invested, and not otherwise; and it further avers upon information and belief that the complainants well knew of the entry of the said decree at or about the date of the entry thereof, and that the entry of such decree was well known and notorious and mentioned and commented upon at the time in the public press. It prays leave to refer to the proofs on file in said consolidated suit to show more fully and accurately their extent, purport, and effect. It avers that the defences alluded to in its answer in 241 said suit arose upon the mortgages, which were in evidence therein and which constituted the only testimony which the railway company could produce in support of such defence. It denies that the decree fails to fix, or the court fails to find, the amount due under the several mortgages, or that it in any way fixes the amount to be paid by the company in order to prevent a sale of the mortgaged property, as alleged. It denies that there were any amounts in the hands of the trustees, or promissory notes representing proceeds of land sales, or amounts in the hands of receivers which should have been deducted from amounts mentioned and referred to in the decree.

Twelfth.

It admits and avers upon information and belief that at the sale made under and in pursuance of such decree on the eight- day of September, 1888, the property covered by the Waco and Northwestern division first mortgage referred to in said decree was purchased, subject to such mortgage, by George E. Downs, one of the defendants herein, at and for the sum of $25,000, one Earnest B. Kruttschnitt acting as attorney for said Downs in making said bid and purchasing said property for and on behalf of said Downs. The other property sold at such sale was, as this defendant in informed and believes, purchased by defendant Frederic P. Olcott for the sum of $10,580,000. This defendant is informed and believes that the property purchased by the defendant Downs included all the 242 property covered by the Waco and Northwestern division first mortgage, as prescribed in said decree under which said sale was made, including franchises and land grants covering, as was then supposed, about 277,200 acres of land, but such purchase was made subject to said first mortgage, though without any personal assumption of the payment of said first mortgage by the purchaser. The title of this company to such land has been, however, since attacked by the attorney general of the State of Texas. It denies upon information and belief that the said purchase was made in pursuance of said plan of reorganization, the holders of Waco and Northwestern division bonds having in fact refused to participate to the required extent in reorganization. It admits upon information and belief that Mr. Kruttschnitt above referred to, who is a well-known lawyer of the city of New Orleans, and a member of the firm of Farrar, Jonas & Kruttschnitt, of that city, was, as matter of fact, one of the attorneys for the Southern Development Company in the suit which it commenced against this company in or about January, 1885. It denies upon information and belief that in making said purchase said Downs was acting for and in the interest of said Huntington and his associates, or that they were real purchasers of said property.

Thirteenth.

Upon and according to the best of its knowledge, information, and belief upon the subject, it denies the allegations contained 243 in the first two paragraphs of subdivision 10 of said bill, being the portion of said division to and including the words "and is non-judicial and void," and each and every of such allegations, and upon information and belief it denies that the said decree was without jurisdiction or for any cause was invalid or void, or that there ever was any scheme to acquire possession of the road in the interest of the defendant Huntington or the Southern Pacific Company without regard to the rights or interests of the holders of stock of this company or in disregard of any provisions or terms of the mortgages or otherwise howsoever, or that the decree above referred to was procured by any collusion or fraud or was a part of any scheme to acquire possession of the road in the interest of the defendant Huntington or the Southern Pacific Company or otherwise howsoever.

Fourteenth.

It denies upon information and belief the allegations contained in subdivision 11 of the said bill and each and every of them, and denies that the said Huntington, either alone or with associates, has ever purchased or acquired the possession of the said railway under such foreclosure sale or has ever filed articles of incorporation under the laws of the State of Texas to organize or incorporate a new company to take or operate the same or ever issued any notice to stockholders as to participation in stock of the new company, either as alleged in the complaint or otherwise.

244 It denies upon information and belief that the so-called assessment was wrongfully or fraudulently contrived or made up, or that it was made by the defendant Huntington either alone or with associates or at all, or that it was a part of any plan or scheme for obtaining possession of the Houston and Texas Central railway, or that it was not fixed and determined by the Central Trust Company, or that the floating indebtedness of this company is less than computed in making up such assessment (on the contrary, it avers that such indebtedness is greater than so computed). It denies that the assessment is or was an attempt to compel the stockholders of this company to turn over their stock to any one or to purchase from any one stock in the new company.

In reply to the allegations contained in the complaint that the interest of the stockholders in said railway is of great value, and the plaintiffs verily believe that if the said road was operated with a view to the interests of the stockholders the property could be cleared from all encumbrances, the interest due on the bonds might be paid, the bonds taken up at maturity and payment of the same satisfactorily arranged, and the railway again become one of the most profitable and valuable in the State of Texas, the defendant says that it is unable to admit or deny the same ; that in its judgment the interest of the stockholders in said road is of very doubtful and uncertain value, and — is altogether uncertain and problematical whether any operation of the said road would result in giving any
245 considerable value to the stock after payment of the interest due upon the bonds thereof ; that the results of the operation of said road and the possible benefit or advantage to be derived therefrom by the stockholders depend upon many circumstances, such as the rapidity of growth of the country through which the road runs, the construction of other lines into the same territory, the rates which could be secured upon business, as well as the amounts which might be obtained for so much of its land grant as the railroad company may be able to secure the benefit of, and many other contingencies, all of a business character, in respect to which judgment of well-informed persons would very likely wholly differ and in respect to which it is very difficult to form any satisfactory judgment whatever.

Fifteenth.

It admits upon information and belief that the complainants were not parties to the consolidated cause or any of the other suits in Texas in respect to the said property. Except as aforesaid, it denies upon information and belief the allegations contained in the last three paragraphs of subdivision 12 of said bill (being so much thereof as follows the words "that the floating indebtedness of the company has not been correctly ascertained") and the allegations contained in subdivision 13 of said bill and each of them.

Sixteenth.

As to the allegations contained in subdivision 14 of said bill, it avers upon information and belief that the capital stock of 246 the new company viz., the Houston and Texas Central Railroad Company, has been fixed at $10,000,000, and that it has been and is the intention of those concerned in carrying out said plan that the mortgage bonds referred to in the plan of reorganization should be issued and disposed of in the manner in said plan prescribed, but not so far as this defendant is informed or believes, to put the same upon the market otherwise than as persons receiving the same under such plan of reorganization might see fit for their own account to market the same. Except as hereinbefore specifically admitted, it denies the allegations contained in subdivision 14 of said bill and each of them.

Seventeenth.

It denies upon information and belief that the directors of the Houston and Texas Central Railway Company had or have any interests inimical to those of the complainants or other stockholders similarly situated or acted or are acting with or in the interest of the defendant Huntington or any syndicate of his or the Southern Pacific Company or otherwise than in the interest of the Houston and Texas Central Railway Company, of which they were and are directors, or permitted the entry of the decree or suffered the property of the said company to be disposed of as charged in the bill. As to the effect or result of any notice to the board of directors or any of them to institute suit or proceed to vacate the decree above

referred to or the sale thereunder or appeal therefrom, it has no knowledge nor information sufficient to form a belief, but it
247 denies upon information and belief that it would result in any such wise as is alleged in the complaint. It denies that the directors or those who control the action of the corporation are acting for their own interests or in a manner destructive of the company or of the rights of the shareholders, or that the complainants have made any effort to obtain redress at the hands of the directors or shareholders of the company. As to the pleadings and proceedings in the action in the supreme court of the State of New York, mentioned in subdivision 15 of said bill, it prays leave to refer to the record, pleadings, and proceedings in said cause so far as material, but it denies upon information and belief that the said Huntington, either with or without associates, caused the interposition of any answer therein except his own.

Eighteenth.

It denies upon information and belief that the plaintiffs are entitled to redress, as alleged in said bill, or to have any redress whatever in the premises, or that they have suffered any wrong or injury by reason of any of the matters or things in said complaint alleged or referred to.

Nineteenth.

It further submits to this honorable court that none of the matters in said amended bill of complaint mentioned and complained of are matters in respect of which complainants are entitled to the relief prayed for or any relief herein, and this defendant prays for
248 the same benefit of defence hereto as if it had demurred to said amended bill.

And it denies all unlawful confederation and the fraud in said amended bill charged, without this, that any other matter or thing material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered unto, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE HOUSTON & TEXAS CENTRAL RAILWAY CO.,
By CHAS. DILLINGHAM, *Vice-president.*

Attest :
[SEAL.] H. HALL, *Secretary.*
BAKER, BOTTS & BAKER,
Sol. & Counsel.

Endorsed : No. 228. Equity. In the circuit court of the United States for the eastern district of Texas, at Galveston. S. W. Carey *et al. vs.* The Houston and Texas Central Railway Company *et al.* The separate answer of the Houston & Texas Central Railway Co. Filed August 25th, 1890. C. Dart, clerk. 219

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250 The joint and several answer of Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E. W. Cave, Charles Dillingham, J. J. Atkinson, A. H. Swanson and Charles Fowler, directors of the Houston & Texas Central Railway Company, and the separate answer of Chas. Dillingham, as receiver. Filed August 25th, 1890. C. Dart, clerk.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

S. W. CAREY *et al.*
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.*

The joint and several answer of Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E. W. Cave, Charles Dillingham, J. J. Atkinson, A. H. Swanson, and Charles Fowler, directors of the Houston & Texas Central Railway Company, styled in the bill the Houston & Texas Central Railway Company (No. 1), and the separate answer of Charles Dillingham, as receiver, to the amended bill of complaint of S. W. Carey and others in the above-entitled suit.

251-254 These defendants, now and at all times hereafter, saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and insufficiencies in the said bill of complaint contained, for answer thereunto or to so much thereof as these defendants are advised it is material or necessary for them to make answer unto, answering, say:

First.

They have no knowledge and are uninformed save by said bill as to the allegations of said bill of complaint in respect to the residence or citizenship of the complainants or any of them.

Second.

They deny that their codefendant, The Houston and Texas Central Railway Company, is, or since February 20th, 1885, has been, in possession or engaged in the operation of any railway in the State of Texas or elsewhere, and they aver that the railway formerly operated by it has been at all times since said 20th day of February, 1885, and is now in possession of and operated by receivers or a receiver thereof appointed by and acting under orders of this honorable court.

Third.

They have no knowledge and are uninformed save by said bill as to the allegations contained in subdivision 2 of said bill or any of them.

Fourth.

255 They admit that at or about the times of their respective dates the Houston and Texas Central Railway Company executed mortgages or deeds of trust commonly known by the several designations referred to in subdivision 3 of said bill, and pray leave to refer to the originals or certified copies of such mortgages or deeds of trust when the same shall be produced in this suit, and they deny each and every allegation of said bill in respect to the contents, purport, and effect thereof, except so far as upon reference to the said mortgages or deeds of trust or certified copies thereof the same shall be found correct and true.

Fifth.

They admit that in and prior to the year 1883 a majority of the stock and a controlling interest in the said company (if and so far as the ownership of a majority of the stock thereof conferred the same, but not otherwise) was owned by a corporation created and existing under the laws of the State of Louisiana known as Morgan's Louisiana and Texas Railroad and Steamship Company, and they admit upon information and belief that in the early part of the year 1883 the defendant Huntington was interested in and a large stockholder of the Southern Development Company, a corporation organized under the laws of the State of California.

Upon information and belief they deny that the said Huntington, with his associates, controlled the said Southern Development Company in any other sense than that the directors of the said 256 company were and are elected by the votes of the holders of a majority of the capital stock of said corporation, and said Huntington, with those who were his associates in the sense of being fellow-stockholders with him in the corporation, had thus, from time to time, elected the board of directors thereof.

They deny upon information and belief each and every allegation contained in the first paragraph of subdivision 4 of said complaint (being the paragraph ending with the words "thus obtaining control of said last-named company"), except so far as the same are hereinbefore in this subdivision of this answer specifically admitted.

Sixth.

They aver that the facts in respect to the relations between the Southern Development Company, Morgan's Louisiana and Texas Railroad and Steamship Company (hereinafter called the Morgan Company), and the Houston and Texas Central Railway Company were as follows and not otheswise: The late Charles Morgan, having become, in or about the year 1877, the owner of a majority of the capital stock of said railway company (paying therefor about — per share), afterwards and shortly before the time of his death transferred such majority of said capital stock to the Morgan Company, which had been formed for the purpose of acquiring the important railroad and steamship properties theretofore owned by Charles Morgan individually. Some years after the death of Mr. 257 Morgan, and in the spring of the year 1883, a contract was tained, for answer thereunto or to so much thereof as these defendants are advised it is material or necessary for them to make answer unto, answering, say:

First.

They have no knowledge and are uninformed save by said bill as to the allegations of said bill of complaint in respect to the residence or citizenship of the complainants or any of them.

Second.

They deny that their codefendant, The Houston and Texas Central Railway Company, is, or since February 20th, 1885, has been, in possession or engaged in the operation of any railway in the State of Texas or elsewhere, and they aver that the railway formerly operated by it has been at all times since said 20th day of February, 1885, and is now in possession of and operated by receivers or a receiver thereof appointed by and acting under orders of this honorable court.

Third.

They have no knowledge and are uninformed save by said bill as to the allegations contained in subdivision 2 of said bill or any of them.

Fourth.

255 They admit that at or about the times of their respective dates the Houston and Texas Central Railway Company executed mortgages or deeds of trust commonly known by the several designations referred to in subdivision 3 of said bill, and pray leave to refer to the originals or certified copies of such mortgages or deeds of trust when the same shall be produced in this suit, and they deny each and every allegation of said bill in respect to the contents, purport, and effect thereof, except so far as upon reference to the said mortgages or deeds of trust or certified copies thereof the same shall be found correct and true.

Fifth.

They admit that in and prior to the year 1883 a majority of the stock and a controlling interest in the said company (if and so far as the ownership of a majority of the stock thereof conferred the same, but not otherwise) was owned by a corporation created and existing under the laws of the State of Louisiana known as Morgan's Louisiana and Texas Railroad and Steamship Company, and they admit upon information and belief that in the early part of the year 1883 the defendant Huntington was interested in and a large stockholder of the Southern Development Company, a corporation organized under the laws of the State of California.

Upon information and belief they deny that the said Huntington, with his associates, controlled the said Southern Development Company in any other sense than that the directors of the said 256 company were and are elected by the votes of the holders of a majority of the capital stock of said corporation, and said Huntington, with those who were his associates in the sense of being fellow-stockholders with him in the corporation, had thus, from time to time, elected the board of directors thereof.

They deny upon information and belief each and every allegation contained in the first paragraph of subdivision 4 of said complaint (being the paragraph ending with the words "thus obtaining control of said last-named company"), except so far as the same are hereinbefore in this subdivision of this answer specifically admitted.

Sixth.

They aver that the facts in respect to the relations between the Southern Development Company, Morgan's Louisiana and Texas Railroad and Steamship Company (hereinafter called the Morgan Company), and the Houston and Texas Central Railway Company were as follows and not otheswise: The late Charles Morgan, having become, in or about the year 1877, the owner of a majority of the capital stock of said railway company (paying therefor about — per share), afterwards and shortly before the time of his death transferred such majority of said capital stock to the Morgan Company, which had been formed for the purpose of acquiring the important railroad and steamship properties theretofore owned by Charles Morgan individually. Some years after the death of Mr. 257 Morgan, and in the spring of the year 1883, a contract was made between the Southern Development Company and the administratrix of the estate of and donees of Charles Morgan for the purchase by the Southern Development Company of upwards of a majority of the capital stock of the Morgan Company. This contract was fulfilled by both parties thereto, and the Southern Development Company acquired thereunder upwards of a majority of the capital stock of the Morgan Company. They are informed and believe that the acquisition of stock of the Morgan Company, a corporation which owned an important line of steamships between New York, New Orleans, Galveston, and other ports, and a railroad in the State of Louisiana, entending from New Orleans to a junction with the Louisiana Western Railroad Company, a Louisiana corporation, in which the Southern Development Company was a large stockholder, was the controlling inducement for such purchase of the stock of the Morgan Company, and the fact that the Morgan Company owned a majority of the stock of said Houston and Texas Central railway formed but an unimportant and wholly collateral inducement to the Southern Development Company to make such purchase.

Seventh.

They admit that the Southern Pacific Company was chartered under the laws of the State of Kentucky in the year 1884, and that the defendant Huntington was vice-president, and they aver that he is now president thereof. They deny upon information and belief the allegation in said bill of complaint contained 258 that the said Huntington, with his associates, own a majority and controlling interest in the said Southern Pacific Company in any other sense than that the directors of the company were and are elected by votes of a majority of the cap-tal stock of said corporation, and the said Huntington, with those who are his associates, in the sense of being fellow-stockholders with him in the corporation, have thus from time to time, elected the board of directors thereof. They admit upon information and belief that the Southern Pacific Company acquired the interest formerly held by the Southern Development Company in the stock of the Morgan Company, but they deny that the Southern Pacific Company has been able to or has controlled said Houston & Texas Central Railway Company or named or elected its officers or directors otherwise than that the Morgan Company, a majority of whose stock was owned by the Southern Pacific Company, has owned a majority of the stock of said railway company and has been entitled to exercise and has exercised the rights conferred upon it by reason of such stock ownership.

They deny that, at the time in that behalf in the complaint referred to, the Houston and Texas Central railway was the most reliable railway in the State of Texas. On the contrary, they aver that on account of the large number of accidents resulting from the condition of its track and the large death losses resulting therefrom it had acquired the sobriquet in Texas of the "Angelmaker."

259 They deny the allegation in the bill of complaint contained that the land grants from the State of Texas then owned by said railway company amounted to 5,500,000 acres, and upon information and belief they aver that such land grants, as then understood, did not amount to upwards of 4,500,000 acres, and they aver upon information and belief that the rights and claims of said railway company to important portions of said land grants are now disputed by the attorney general of the State of Texas, who has taken proceedings to prevent its obtaining patents from the State therefor.

They deny upon information and belief each and every allegation in the bill of complaint contained as to any syndicate's obtaining control of or acquiring a controlling interest in the Houston and Texas Central railway. They deny upon information and belief, that through any acts, suits or proceedings in said bill of complaint referred to, or otherwise, any rights of holders of the stock of said company were sought or attempted to be shut out or barred, or that any syndicate ever acquired or sought or attempted to acquire the absolute control of the company, so that the railway might be run solely or at all in the interest of said syndicate or the Southern Pacific Company, or that any effort was made to deprive the holders of the stock of the company of or to in anywise impair any rights which they had or might possess in, to, or in respect to the said company or its stock. They deny that said Huntington and his associates ever obtained any control of or interest in the
260 Houston and Texas Central Railway Company save as they were interested in the stock of the Southern Development Company or the Southern Pacific Company and as said Southern Development Company or Southern Pacific Company were interested in the stock of said Morgan Company and as said

Morgan Company was interested in the stock of said railway company all as stated above. They have no knowledge and are uninformed save by said bill as to the price paid by the complainants or any of them for any of its stock which may have been purchased by them or any of them. They deny the allegation in said complaint contained that in January, 1885, when the holders of first-mortgage bonds, main line and branches, presented their coupons for payment, it was fraudulently and wrongfully contrived by said Huntington and his associates that said coupons were cashed and secretly taken up by the Southern Development Company without notice to the holders thereof. They deny that there was any contrivance, secrecy or concealment about or in connection with the transaction, the fact in respect thereto being that said railway company was wholly without resources wherewith to pay such coupons or any part thereof, and the Southern Development Company voluntarily offered to purchase the coupons at their par or face value from any coupon-holders who should elect to sell the same and execute bills of sale to it thereof; some coupon-holders elected to sell and others refused to do so, and each coupon-holder determined for himself which course he chose to pursue in reference
261 thereto. They admit that the market price of the stock of said Houston and Texas Central Railway Company gradually declined from about par, in 1881 or thereabouts, to about one dollar per share in 1889, but they are unable to state whether or not the particular statements in regard to the *course* of such decline contained in said bill are accurate. The cause, however, of such decline in market value between 1881 and 1884 and of the inability of said railway company to provide for or pay the interest which fell due on the first day of January, 1885, *are* simple and obvious. During the years 1881 to 1884 said company, in each and every year, earned very much less than the interest upon its bonded debt after paying the expenses of operation and betterments, taxes and interest on floating debt, such deficit being substantially as follows :

1881 :	1882 :	1883 :	1884 :
$723,836.51	$430,177.16	$570,979.25	$991,481.44

The high prices at which the stock was sold in or about 1881 seem to have been predicated upon an exaggerated estimate of the value of the company's land grants and an ignoring of the cost and expense of necessary repairs and betterments of the property. The

depreciation of the stock since 1885 has no doubt been largely predicated upon the fact that the earnings of the property during the receivership, viz., from 1885 to 1888, have also been insufficient to provide for the payment of interest on the bonded debt, the
262 excess remaining for providing for interest on the bonded debt during the years 1885 to 1888 being asthese defendants are informed and believe, as follows:

1885:	1886:	1887:	1888:
$492,953.63	$650,406.75	$243,540.26	$265,300.07

while the interest accruing on the bonded debt, as the same existed prior to the reorganization, was $1,193,000 and the reduced interest under the plan of reorganization (after securing all reductions to which the bondholders would assent) is $868,993.

Eighth.

In answer to the allegations of said complaint in respect to the pleadings and proceedings in the various suits therein referred to, they pray leave to refer to the records thereof or to certified copies thereof when produced in this action; and in answer to the allegations of said complaint in respect to the contents, provisions, and effect of the several mortgages therein referred to, they pray leave to refer to the originals of said mortgages or certified copies thereof when the same may be produced in this action.

Ninth.

These defendants aver upon information and belief that the consolidated cause referred to in said complaint was founded not alone upon the default made in January, 1885, in the payment of interest on the bonds of the said railway company and interest falling due thereafter, but upon many alleged defaults of the railway
263 company claimed to have taken place long prior to that date, and that it was claimed and asserted therein that by reason of such alleged defaults the bonds had matured and the principal had become due, but whether or not such claim or contention could lawfully and justly be maintained these defendants are unable to state.

They have no knowledge nor information sufficient to form a belief whether or not, as matter of fact or law, the bonds of said railway company had legally matured and the principal thereof had become due at the time of the commencement of the suits mentioned in said bill, or whether the principal of such bonds has matured or will only hereafter mature at later dates, as alleged in said bill. They allege upon information and belief that any retirement, payment, or exchange of income and indemnity bonds of said company, whichever took place, was made under and subject to the following, among other, provisions in respect to the partial exchange of bonds of that issue, as expressed in the general mortgage in the said bill referred to, viz: "That when any of said prior-lien bonds are purchased or taken up by exchange, they shall not be cancelled or the mortgage given to secure the payment thoreof discharged until such time as the trustee herein named has the entire amount of bonds purporting to be secured under any one of the before-recited mortgages," * * * and "that all of the prior bonds received in exchange for bonds issued hereunder, except as last above provided, shall be held by the trustee 264 herein named, as follows: First, as an additional security for the payment of the principal and interest of the bonds issued under this deed; second, for the benefit and security of the Houston and Texas Central Railway Company, its successors and assigns," and that at the time of the entry of the decree of May 4, 1888, therein referred to, all such income and indemnity bonds had not been exchanged or tendered or offered for exchange, but one of such bonds still remain outstanding, wholly unpaid and unexchanged, and the income and indemnity bonds against which general mortgage bonds had been exchanged were held by the Farmers' Loan and Trust Company, as trustees under such general mortgage, as an additional security for the payment of the outstanding general mortgage bonds. Upon the advice of counsel, they deny the allegation that none of the mortgages or deeds of trust of said railway company permit the sale of the railway prior to the maturity of the principal of the bonds referred to in the respective mortgages of either of them.

Tenth.

They admit upon information and belief that on or about or under date December 20, 1887, a reorganization agreement was entered into by a majority of the holders of mortgage bonds of said railway company (with the exception of holders of the Waco and

Northwestern bonds), the Southern Pacific Company, and the Central Trust Company, and, in answer to the allegations of said 265 bill in respect to the contents, purport, and effect thereof, they pray leave to refer to the original or a copy of such agreement when the same may be produced in this suit. They aver that prior to the making of such agreement it had been freely stated that the counsel for the Farmers' Loan and Trust Company expected to procure, in April or May, 1888, a decree for the foreclosure of said railway company's general mortgage and a sale of the property thereunder, and it was uncertain whether their application for a decree of foreclosure and sale at that time could be postponed or delayed or successfully resisted. They aver upon information and belief that the negotiations for and making of the reorganization agreement above referred to were well known and notorious and freely mentioned and commented upon in the public press, and that the complainants well knew at the time thereof of the negotiations for or making of said agreement and well knew at the time thereof that such agreement was pending and signatures of interested parties were being procured thereto.

Eleventh.

In answer to so much of the said bill of complaint as relates to the decree made at the May term, 1888, of the United States circuit court for the eastern district of Texas, they pray leave to refer to the original or a certified copy thereof when the same may be produced in this suit, and deny all allegations in said bill contained in respect to the contents, purport, and effect thereof, except so far as by said original or certified copy—decree, 266 reference thereto being had, the same may be found to be correct and true. Upon information and belief they deny that the same was a decree by consent, or that the same was entered in pursuance of any plan, agreement, or scheme, the same being, as these defendants are informed and believe, the judicial decree of the circuit court of the United States for the eastern district of Texas, made and entered in fulfillment of the judicial duties and functions with which said court was and is by law invested, and not otherwise and they further aver upon information and belief that the complainants well knew of the entry of the said decree at or about the date of the entry thereof, and that the entry of such decree was well known and notorious and mentioned and commented upon at the time in the public press. They pray leave to refer to the proofs on file in said consolidated suit to show more fully and accurately their extent, purport, and effect. They aver that the defences alluded to in said railway company's answer in said suit arose upon the mortgages which were in evidence therein and which constituted the only testimony which the railway company could produce in support of such defence. They deny that the decree fails to fix or the court fails to find the amount due under the several mortgages or that it in any way fixes the amount to be paid by the company in order to prevent a sale of the mortgaged property as alleged. They deny that there were any amounts in the hands of trustees or promissory notes representing proceeds of land sales or amounts in 267 the hands of receivers which should have been deducted from amounts mentioned and referred to in the decree.

Twelfth.

They admit and aver upon information and belief that at the sale made under and in pursuance of such decree on the eighth day of September, 1888, the property covered by the Waco and Northwestern division first mortgage referred to in said decree was purchased, subject to such mortgage, by George E. Downs, one of the defendants herein, at and for the sum of $25,000, one Earnest B. Kruttschnitt acting as attorney for said Downs in making said bid and purchasing said property for and on behalf of said Downs. The other property sold at such sale was, as these defendants are informed and believe, purchased by defendant Frederic P. Olcott for the sum of $10,580,000. These defendanls are informed and believe that the property purchased by the defendant Downs included all the property covered by the Waco and Northwestern division first mortgage, as prescribed in said decree under which said sale was made, including franchises and land grants, covering, as was then supposed, about 277,200 acres of land; but such purchase was made subject to said first mortgage, though without any personal assumption of the payment of said first mortgage by the purchaser. The title of said company to such land has been, however, since attacked by the attorney general of the State of Texas. They deny upon information and belief that the said purchase was made 268 in pursuance of said plan of reorganization, the holders of Waco and Northwestern division bonds having, in fact, refused to participate to the required extent in the reorganization.

They admit upon information and belief that the Mr. Kruttschnitt above referred to, who is a well-known lawyer of the city of New Orleans and a member of the firm of Farras, Jonas & Kruttschnitt, of that city, was, as matter of fact, one of the attorneys for the Southern Development Company in the suit which it commenced against the Houston & Texas Central Railway Company in or about January, 1885. They deny upon information and belief that in making said purchase said Downs was acting for and in the interest of said Huntington and his associates, or that they were the real purchasers of said property.

Thirteenth.

Upon and according to the best of their knowledge, information, and belief on the subject, they deny the allegations contained in the first two paragraphs of subdivision 10 of said bill, being the portion of said subdivision to and including the words "and is non-judicial and void," and each and every of such allegations; and upon information and belief they deny that the said decree was without jurisdiction or for any cause was invalid or void, or that there ever was any scheme to acquire possession of the road in the interest of the defendant Huntington or the Southern Pacific Company without regard to the rights or interests of the holders of stock of 269 said railway company or in disregard of any provisions or terms of the mortgages or otherwise howsoever, or that the decree above referred to was procured by any collusion or fraud or was a part of any scheme to acquire possession of the road in the interest of the defendant Huntington or the Southern Pacific Company or otherwise howsoever.

Fourteenth.

They deny upon information and belief the allegations contained in subdivision 11 of the said bill and each and every of them, and deny that the said Huntington, either alone or with associates, has ever purchased or acquired the possession of the said railway under such foreclosure sale or has ever filed articles of incorporation under the laws of the State of Texas to organize or incorporate a new company to take or operate the same or ever issued any notice to stockholders as to participation in stock of the new company, either as alleged in the complaint or otherwise.

They deny upon information and belief that the so-called assessment was wrongfully or fraudulently contrived or made up, or that it was made by the defendant Huntington, either alone or with associates or at all, or that it was a part of any plan or scheme for obtaining possession of the Houston and Texas Central railway, or
that it was not fixed and determined by the Central Trust
270 Company, or that the floating indebtedness of said company
is less than computed in making up such assessment. (On the contrary, they aver that such indebtedness is greater than so computed.) They deny that the assessment is or was an attempt to compel the stockholders of said railway company to turn over their stock to any one or to purchase from any one stock in the new company.

In reply to the allegations contained in the complaint that the interest of the stockholders in said railway is of great value, and the plaintiffs verily believe that if the said road was operated with a view to the interests of the stockholders the property could be cleared from all incumbrances, the interest due on the bonds might be paid, the bonds taken up at maturity and payment of the same satisfactorily arranged, and the railway become again one of the most profitable and valuable in the State of Texas, these defendants say that they are unable to admit or deny the same; that in their judgment the interest of the stockholders in said road is of very doubtful and uncertain value, and it is altogether uncertain and problematical whether any operation of the said road would result in giving any considerable value to the stock after payment of the interest due upon the bonds thereof; that the results of the operation of said road and the possible benefit or advantage to be derived
therefrom by the stockholders depend upon many circum-
271 stances, such as the rapidity of growth of the country through
which the road runs, the construction of other lines into the same territory, the rates which could be secured upon business, as well as the amounts which might be obtained for so much of its land grant as the railroad company may be able to secure the benfit of, and many other contingencies, all of a business character, in respect to which judgment of well-informed persons would very likely wholly differ, and in respect to which it is very difficult to form any satisfactory judgment whatever.

Fifteenth.

They admit upon information and belief that the complainants were not parties to the consolidated cause or any of the other suits in Texas in respect to the said property. Except as aforesaid, they deny upon information and belief the allegations contained in the last three paragraphs of subdivision 12 of said bill (being so much thereof as follows the words "that the floating indebtedness of the company has not been correctly ascertained") and the allegations contained in subdivision 13 of said bill and each of them.

Sixteenth.

As to the allegations contained in subdivision 14 of said bill, they aver upon information and belief that the capital stock of the new company, viz., the Houston and Texas Central Railway Company, has been fixed at $10,000,000, and that it has been and is
272 the intention of those concerned in carrying out said plan
that the mortgage bonds referred to in the plan of reorganization should be issued and disposed of in the manner said plan prescribed, but not, so far as these defendants are informed or believe, to put the same upon the market otherwise than as persons receiving the same under such plan of reorgnization might see fit, for their own account, to market the same. Except as hereinbefore specifically admitted, they deny the allegations contained in subdivision 14 of said bill and each of them.

Seventeenth.

These defendants deny that they and the other directors of the Houston and Texas Central Railway Company had or have any interests inimical to those of the complainants or other stockholders similarly situated or acted or are acting with or in the interest of the defendant Huntington or any syndicate of his or the Southern Pacific Company, or otherwise than in the interest of the Houston and Texas Central Railway Company, of which they were and are directors, or that they or either of them permitted the entry of the decree or suffered the property of the said company to be disposed of as charged in the bill. As to the effect or result of any notice to the board of directors or any of them to institute suit or proceed to vacate the decree above referred to or the sale thereunder or appeal therefrom, they have no knowledge or information sufficient 273 to form a belief, but they deny upon information and belief that it would result in any such wise as is alleged in the complaint. They deny that they, as directors, or those who control the action of the corporation are acting for their own interests or in a manner destructive of the company or of the rights of the shareholders, or that the complainants have made any effort to obtain redress at the hands of the directors or shareholders of the company. As to the pleadings and proceedings in the action in the supreme court of the State of New York mentioned in subdivision 15 of said bill, they pray leave to refer to the record, pleadings, and proceedings in said cause so far as material; but they deny upon information and belief that the said Huntington, either with or without associates, caused the interposition of any answer therein except his own.

Eighteenth.

They deny upon information and belief that the plaintiffs are entitled to redress as alleged in said bill or to any redress whatever in the premises, or that they have suffered any wrong or injury by reason of any of the matters or things in said complaint alleged or referred to.

Nineteenth.

They further submit to this honorable court that none of the matters in said amended bill of complaint mentioned and complained of are matters in respect of which complainants are entitled to the relief prayed for or any relief herein, and these de- 274 fendants pray for the same benefit of defence hereto as if it had demurred to said amended bill.

And they deny all unlawful confederation and fraud in said amended bill charged, without this, that any other matter or thing material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered unto, confessed, traversed, and avoided or denied is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

CHAS. DILLINGHAM,
As Receiver and as a Director of the H. & T. C. R. W. Co.
J. J. ATKINSON,
Director H. & T. C. R'y Co.
A. H. SWANSON,
Director H. & T. C. R'y Co.
CHAS. FOWLER,
Director H. & T. C. R'y Co.
E. W. CAVE,
Director H. & T. C. R'y Co.
ISAAC E. GATES,
Director H. & T. C. R'y Co.
J. G. SCHRIEVER,
Director H. & T. C. R'y Co.
A. C. HUTCHINSON,
Director H. & T. C. R'y Co.

BAKER, BOTTS & BAKER,
Solicitors & Counsel.

Endorsed: No. 228. Equity. In the circuit court of the United States for the eastern district of Texas, at Galveston. S. W.
275 Carey *et al. vs.* The Houston and Texas Central Railway Company *et al.* The joint and several answer of Isaac E. Gates, J. G. Sch-iever, A. C. Hutchinson, E. W. Cave, Charles Dillingham, J. J. Atkinson, A. H. Swanson, and Charles Fowler, directors of the Houston & Texas Central Railway Company, and the separate answer of Chas. Dillingham, as receiver. Filed August 25th, 1890. C. Dart, clerk.

vacate the decree above referred to or the sale thereunder or appeal therefrom, they have no knowledge or information sufficient 273 to form a belief, but they deny upon information and belief that it would result in any such wise as is alleged in the complaint. They deny that they, as directors, or those who control the action of the corporation are acting for their own interests or in a manner destructive of the company or of the rights of the shareholders, or that the complainants have made any effort to obtain redress at the hands of the directors or shareholders of the company. As to the pleadings and proceedings in the action in the supreme court of the State of New York mentioned in subdivision 15 of said bill, they pray leave to refer to the record, pleadings, and proceedings in said cause so far as material; but they deny upon information and belief that the said Huntington, either with or without associates, caused the interposition of any answer therein except his own.

Eighteenth.

They deny upon information and belief that the plaintiffs are entitled to redress as alleged in said bill or to any redress whatever in the premises, or that they have suffered any wrong or injury by reason of any of the matters or things in said complaint alleged or referred to.

Nineteenth.

They further submit to this honorable court that none of the matters in said amended bill of complaint mentioned and complained of are matters in respect of which complainants are entitled to the relief prayed for or any relief herein, and these 274 defendants pray for the same benefit of defence hereto as if it had demurred to said amended bill.

And they deny all unlawful confederation and fraud in said amended bill charged, without this, that any other matter or thing material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered unto, confessed, traversed, and avoided or denied is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

CHAS. DILLINGHAM,
As Receiver and as a Director of the H. & T. C. R. W. Co.
J. J. ATKINSON,
Director H. & T. C. R'y Co.
A. H. SWANSON,
Director H. & T. C. R'y Co.
CHAS. FOWLER,
Director H. & T. C. R'y Co.
E. W. CAVE,
Director H. & T. C. R'y Co.
ISAAC E. GATES,
Director H. & T. C. R'y Co.
J. G. SCHRIEVER,
Director H. & T. C. R'y Co.
A. C. HUTCHINSON,
Director H. & T. C. R'y Co.

BAKER, BOTTS & BAKER,
Solicitors & Counsel.

Endorsed: No. 228. Equity. In the circuit court of the United
States for the eastern district of Texas, at Galveston. S. W.
275 Carey *et al. vs.* The Houston and Texas Central Railway
Company *et al.* The joint and several answer of Isaac E. Gates, J. G. Sch-iever, A. C. Hutchinson, E. W. Cave, Charles Dillingham, J. J. Atkinson, A. H. Swanson, and Charles Fowler, directors of the Houston & Texas Central Railway Company, and the separate answer of Chas. Dillingham, as receiver. Filed August 25th, 1890. C. Dart, clerk.

276 *Replication to Answers of Defendants George E. Downs, the Railway Co., and Directors and Receiver. Filed Oct.* 14*th*, 1890

In the Circuit Court of the United States for the Eastern District o Texas.

S. W. CAREY *et al.*, Complainants, *vs.* THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, Defendants.	In Equity.

Replication of complainants to the answers of George E. Downs, The Houston and Texas Central Railway Company, and the joint and several answers of A. C. Hutchinson, E. W. Cave, Charles Dillingham, Isaac E. Gates, J. G. Shriever, J. J. Atkinson, A. H Swanson, and Charles Fowler, directors of the Houston & Texas Central Railway Company, and the separate answer of Charles Dillingham as receiver.

These repliants, saving and reserving unto themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answers, for replication thereunto say that they will aver, maintain, and prove their amended bill of complaint to be true, certain, and sufficient in law to be answered to, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied to by these repliants; without this, that any other matter or thing whatsoever in the said answers contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters 277 and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said amended bill they have already prayed.

R. H. LANDALE,
Sol. for Comps.

Endorsed: N. 228. Equity. In the circuit court of the United States, eastern district of Texas. S. W. Carey *et al. vs.* Houston & Texas Central Railway Company. Replication to answers of defendants George E. Downs, the railway Co., and directors and receiver. Filed Oct. 14th, 1890. C. Dart, clerk, by W. L. Hanscom, deputy.

314 *Separate Answer of Collis P. Huntington to Amended Bill. Filed Oct. 28th, 1890.*

U. S. Circuit Court, Eastern District of Texas.

S. W. CAREY *et al.*
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.*
No. —. In Equity.

The separate answer of Collis P. Huntington to the amended bill of complainants, S. W. Carey *et al.*

This defendant, now and at all times saving and reserving to himself all manner of benefit and advantage of objection and exception which can or may be had or taken to the many errors, uncertainties, and insufficiencies in the said amended bill of complaint, for answer thereunto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, answering, saith :

315 First. This defendant says that the first ten paragraphs of the said amended bill are substantially contained in the first nine paragraphs of the complainants' original bill, to which this defendant has answered fully by his answer thereto filed in this cause, and that the only new matter contained in the said amended bill is contained in sections 11, 12 & 13 thereof, and that it is only necessary for this defendant, in answer to the said amended bill, to reaver and reiterate all the averments of his sworn answer hereinbefore filed, and to make answer to the several new averments contained in sections 11, 12 & 13 of said amended bill; and as regards the averments contained in paragraph 11 of the said amended bill, this defendant avers that all the facts and allegations therein contained setting forth that this defendant and his associates have made any call upon the stockholders of the Houston and Texas Central Railway Company for the payment of an assessment are false and untrue. On the contrary this defendant avers the true facts to be that the said assessment was made by the Central Trust Company of New York, and was attacked by certain stockholders, to wit, one Gernsheim and others, in the courts of proper jurisdiction in the city of New York, and the said assessment of seventy-three per cent., levied by the said Central Trust Company

of New York, was set aside because the court held that it was made by the president of the company and not by the corporation 316 itself; that after this decision was rendered the Central Trust Company, in due form of law and under and by virtue of the discretion vested in it by the reorganization agreement, made the said assessment and fixed the same at less than seventy-three per cent., to wit, about seventy-one and a fraction per cent., and has issued notices, in accordance with the said reorganization agreement, upon all the stockholders to come forward and pay this assessment or to be barred from participation in the avails of the reorganization agreement.

That the said Gernsheim and others made an attack in the courts of New York upon this second assessment so made and prepared by the Central Trust Company, and that it has been declared in the said suit, contradictorily with the said Gernsheim and others and the said Central Trust Company, that the said assessment is due, correct and proper, and that the said Central Trust Company has not in any manner transcended its authority and discretion under the said reorganization agreement.

And, further answering, this defendant avers that all averments contained in the said paragraph that said assessment of seventy-three per cent. was wrongfully and fraudulently contrived by this defendant and his associates are false, malicious, and untrue, and that all the allegations attacking the said assessment in said paragraph and declaring them to be an attempt to compel the stockholders of the Houston and Texas Central Railway Company 317 to turn over their stock to this defendant and his associates and to purchase from them stock in the new company are false, malicious, and untrue, and were recklessly made by the complainants without any ground whatever.

Second. That the averments contained in paragraph 12 of the said amended bill charging this defendant and his associates with making an erroneous statement of the floating debt of the Houston & Texas Central Railway Company are false and untrue; that the main items of the floating debt of the Houston & Texas Central Railway Company consist of the indebtedness due to the Lackawana Iron & Coal Company, to the Morgan's Louisiana & Texas Railroad & Steamship Company, and to the Southern Development Company; that all of these claims have been openly and judicially investigated and the amount thereon reported upon by an officer of this court, to wit, John G. Winter, master in chancery, who examined the said claims

contradictorily with the contesting bondholders, represented by the Farmers' Loan & Trust Company and Easton & Rintoul, trustees, and who reported the amount due on the said claims, principal and interest, to this court, where the said reports are now pending for confirmation in consolidated suit No. 198, referred to in the complainant's bill of complaint; that all the other items of the floating debt of the said company were correctly stated and are matters of fact and record easily obtainable, except as to such contingent
318 amounts as might be necessary to cover the judgments to be
rendered on pending cases and the amounts necessary to settle pending and controverted claims against the Houston & Texas Central Railway Company.

That all averments and statements in the said paragraph 12 of said amended bill charging this defendant and his associates with any fraud in the making up of the statement of floating indebtedness are absolutely untrue, and the imputation to these defendants of any improper motive in their conduct *are* entirely false and malicious.

That all those averments contained in the said paragraph to the effect that this defendant and his associates had fraudulently contrived and permitted judgments to be had against the Houston & Texas Central Railway Company on items of the said floating indebtedness and thus betraying the interests of those whose duty it was to represent are also without any foundation in fact whatever and are recklessly and maliciously made.

Third. That all the facts and all allegations in paragraph 13 of the said bill contained with reference to the conduct, supposition, and beliefs of the complainant about the conduct of the litigation between the bondholders and the Houston & Texas Railway Company and about the plan of reorganization are false and untrue; that the statement that they were in ignorance and unacquainted with the terms of said plan of reorganization until some time
319 in September, 1889, when for the first time they were per-
mitted to know of and to have and read a copy of the agreement of reorganization, and as to the sale, is false and untrue. On the contrary, this defendant avers that the terms and conditions of the said plan of reorganization were a matter of public notoriety for more than two years prior to said September, 1889, and were well known to each other and every one of the complainants in this cause; and this defendant charges that each and every one of the complainants in this cause had seen the said plan of reorganization

and had read and considered the same long prior to the time when the decree was entered in this cause, on May 4, 1888.

That all averments contained in the said paragraph which charge or insinuation that there was any concealment or attempt at concealment on the part of this defendant and his associates and the mortgage bondholders and the other parties interested in the consummation of the said plan of reorganization of the terms and purport of said organization from the complainants or any of the stockholders of the H. & T. C. Railway Company are utterly false and untrue.

That all negotiations and transactions with reference to the said plan of reorganization were open, public, and notorious, and that nothing was concealed or intended to be concealed.

That the said plan of reorganization was printed, hundreds of copies were distributed in various directions to all persons
320 who desired to obtain them, and that the statements contained in the said paragraph that the complainants were ignorant of the plan of reorganization and of its object and purposes are fraudulent and deceitful.

And this defendant charge- that, although the said complainants had the fullest knowledge of the entry of the decree of foreclosure on May 4, 1888, and had full knowledge of the sale of the property under said decree in September, 1888, and the confirmation of said sale, and had full knowledge of the details of said plan of reorganization, they made no objection of any kind or nature to any of the said acts until after the Central Trust Company had made the assessment and called upon the stockholders to pay their assessment or otherwise to be barred; that thereupon the complainants and others of the stockholders in the same situation commenced this vexatious proceeding and others in the court of the State of New York, intending to obstruct, delay, and hinder the carrying out of said plan of reorganization, not, as this defendant charges, with any purpose of obtaining any relief at the hands of the court, but merely for the purpose of trying to force others holding interests very much larger than theirs to buy off their opposition or to give them something more than they were entitled in law and in equity to have, and that all the extravagant allegations contained in the complain-
321 ants' bill and amended bill of fraud, of collusion, and rascality on the part of this defendant and his associates, and of innocence, ignorance, and oppression on their part, are simply a part and parcel of their scheme of obstruction and intended as *pro forma*

allegations to excuse their gross laches in not taking steps to set aside a decree well known to them until more than eighteen months after the decree was rendered and more than a year after the decree was finally executed, all of which laches this defendant specially pleads in bar of the complainants' demand.

And this defendant prays that he may be hence dismissed with his reasonable costs in this behalf sustained.

FARRAR, JONAS & KRUTTSCHNITT,
Counsel & Sol'rs for C. P. Huntington, Def't.

Indorsed: No. 228. U. S. circuit court, E. dist. of La. S. W. Carey *et al. vs.* H. & T. C. R'y Co. Separate answers of Collis P. Huntington to amended bill. Filed Oct. 28, 1890. C. Dart, clerk. Farrar, Jonas & Kruttschnitt, attorneys for def't.

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322 *Separate Answer of the Southern Pacific Company.*

U. S. Circuit Court, Eastern District of Texas.

S. W. Carey *et al.*
vs.
The Houston & Texas Central Railway Company *et als.*
No. —. In Equity.

The separate answer of the Southern Pacific Company to the bil and amended bill of complaint of S. W. Carey *et al.*

This defendant, reserving to itself, now and at all times, all objection that may be had or taken to the many errors, uncertainties and insufficiencies in the complainants' said bill and amended bill of complaint, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for it to answer, answering, saith:

That, in order not to encumber this record with repetitions of long answers, it adopts and reiterates as its own all the allegations and averments contained in the separate answers of Collis P. Huntington, one of its codefendants herein, to the complainant's bill and amended bill, as if the allegations of the said answers were herein individually reiterated and repeated. 323

This defendant particularly and especially denies all the allegations of fraud, collusion, and misconduct imputed to it and its associates in the complainants' bill of complaint and avers that said allegations were grossly and recklessly made to further the ends and purposes of the complainants.

Wherefore this defendant prays that the complainants' demand may be rejected and that this defendant may be hence dismissed with its reasonable costs in this behalf sustained.

FARRAR, JONAS & KRUTTSCHNITT,
Counsel & Sol'rs for Def't Southern Pacific Co.

Indorsed: No. 228. Equity docket. U. S. circuit court, E. dist. of Texas. S. W. Carey *et al. vs.* H. & T. C. R'y Co. *et al.* Separate answer of the Southern Pacific Co. Filed Oct. 28, 1890. C. Dart, clerk. Farrar, Jonas & Kruttschnitt, attorneys for def't.

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324 *Separate Answer of the Lone Star Land Co. Filed October 28th,* 1890.

U. S. Circuit Court, Eastern District of Texas.

S. W. CAREY *et al.*
vs.
THE HOUSTON & TEXAS CENTRAL. } No. —. In Equity.

The separate answer of the Lone Star Land Company, one of the defendants, to the bill and amended bill of complaint of S. W. Carey *et al.*

This defendant, reserving to itself, now and at all times, all benefit of exception and objection to the many errors, uncertainties, and insufficiencies in the complainants' bill of complaint, *or to so much thereof* for answer thereto or to so much thereof as it is advised it is necessary or material for it to answer, answering, saith—

That this defendant is made a party to this bill merely because it was a party to the record of the foreclosure of the mortgages upon the property of the Houston & Texas Central Railway Company, it having purchased the right of redemption of the H. & T. C. Railway Company in certain lands which the said H. & T. C. Railway Company was compelled to sell in order to comply with its obligations to the State of Texas, from whom it had obtained the said lands by

grant. Therefore this defendant adopts and reiterates as its own the allegations contained in the answer of its codefendants without any repetition thereof, and particularly adopts the answer
325 of C. P. Huntington to the complainants' bill and supplemental bill.

Wherefore this defendant prays that there may be a decree against the complainants, and that it may be hence dismissed with its reasonable costs in this behalf sustained.

FARRAR, JONAS & KRUTTSCHNITT,
Counsel & Solicitors for the Lone Star Co.

Indorsed: No. 228. U. S. circuit court, E. dist. of La. S. W Carey *et al. vs.* H. & T. C. R'y Co.. Separate answer of the Lone Star Land Co. Filed Oct. 28th, 1890. C. Dart, clerk.

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327 *The Separate Answer of the Houston & Texas Central Railroad Company.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

S. W. CAREY and Others
against
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY and Others.
} In Equity.

The separate answer of the Houston & Texas Central Railroad Company, styled in the bill "the Houston and Texas Central Railroad Company (No. 2)," to the amended bill of complaint of S. W. Carey and others in the above-entitled suit.

This defendant, now and at all times hereafter, saving and reserving to itself all manner of benefit and advantage of objection and exception which can or may be had or taken to the many errors, uncertainties, and imperfections in the said amended bill of complaint contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, saith:

First. This defendant admits that the allegations of the said amended bill with respect to the organization and existence of the defendant The Houston & Texas Central Railway Company and its ownership and possession of the lands and railway in that behalf mentioned in said bill are substantially true.

Second. This defendant does not know and is not informed,
328 save by said amended bill, with respect to any of the allega-
tions contained in article or subdivision 2 of said amended bill.

Third. This defendant denies that the description of the mortgages or deeds of trust mentioned in the third article or subdivision of the amended bill is correct, and prays leave to refer to the originals or certified copies of such mortgages or deeds of trust when the same shall be produced in this suit, and it denies each and every allegation of said bill in respect to the contents, purport, and effect thereof, except so far as upon reference to the said mortgages or deeds of trust or certified copies thereof the same shall be found correct and true.

It alleges upon information and belief that any retirement, payment, or exchange of income and indemnity bonds of the Houston and Texas Central Railway Company which ever took place was made under and subject to the following, among other, provisions in respect to the partial exchange of bonds of that issue, as expressed in the general mortgage referred to in said bill, and not otherwise, viz: "That when any of said prior lien bonds are purchased or taken up by exchange they shall not be canceled or the mortgage given to secure the payment thereof discharged until such time as the trustee herein named has the entire amount of bonds purporting to be secured under any one of the before-recited mortgages, * * * and that all of the prior bonds received in exchange for bonds
issued hereunder, except as last above provided, shall he held
329 by the trustee herein named as follows: First, as an addi-
tional security for the payment of the principal and interest of the bonds issued under this deed; second, for the benefit and security of the Houston and Texas Central Railway Company, its successors and assigns;" and this defendant denies that all such income and indemnity bonds were retired or exchanged, but, on the contrary, avers that at the time of the foreclosure and sale referred to in the bill one of such bonds still remained outstanding, wholly unpaid and unexchanged, and the income and indemnity bonds against which general mortgage bonds had been exchanged were held by the Farmers' Loan and Trust Company, as trustee under such general mortgage, as an additional security for the payment of the outstanding general mortgage bonds.

Fourth. This defendant, further answering, saith that it is a stranger to all and singular the matters stated and set forth in the article or subdivision of the said amended bill numbered 4, and does not know and is not informed, save by said amended bill, with respect to any of the allegations contained in said article or subdivision 4. except that this defendant is informed and believes that it is not true that the rights of holders of the stock of the Houston and Texas Central Railway Company were at any time sought or attempted to be shut out or barred, or that it was at any time sought or attempted that the absolute control of said company should be acquired by any syndicate. so that the railway of said com-
330 pany might be run in the interest of any syndicate or of the Southern Pacific Company or otherwise, or that in January, 1885, or at any time it was fraudulently or wrongfully contrived that coupons appertaining to the first-mortgage bonds of the said railway company were cashed or taken up by the Southern Development Company or without notice to the holders thereof, or that Charles Dillingham was, at or before the time of his appointment as one of the receivers of the property of said railway company, a director of the Houston and Texas Central Railway Company.

This defendant admits the commencement of suits and the filing of bills of complaint and the appointment of receivers substantially as set forth in said article 4 of said amended bill, but for greater certainty prays leave to refer to the records of the said suits in this court.

Fifth. This defendant denies that none of said several mortgages permit the sale of said railway prior to the maturity of the principal of the bonds referred to in the said respective mortgages or either of them.

Sixth. This defendant admits that on or about December 20th, 1887, an agreement of reorganization of said railway property was made, and for a proper description of the terms and provisions thereof he prays leave to refer to the original or a true copy of said agreement of reorganization.

It denies that the negotiations in reference to said agreement of reorganization were had mainly with Collis P. Huntington, but avers that said negotiations were had mainly between the
331 representatives of the bondholders and the officers of the Houston and Texas Central Railway Company and of the Southern Pacific Company and the counsel of said representatives and of several companies.

Seventh. This defendant admits the making and entry of a decree or judgment of the court in the consolidated cause referred to in said amended bill, and for greater certainty as to the terms and provisions of said decree it prays leave to refer to the record thereof in this court.

It denies that the said decree was entered by consent, or that the same fails to fix or that the court fails to find the amount due under the said several mortgages, or that it in no way fixes the amount to be paid by the company in order to prevent a sale of the mortgaged property.

It denies that there were any amounts of promissory notes representing proceeds of sale of lands which could probably have been deducted from the amounts due under the mortgages.

Eighth. This defendant has no knowledge and is not informed, save by said amended bill, whether or not the defendant George E. Downs, in making the purchase referred to in the 9th article of the amended bill, was acting in the interest of any other person or persons whomsoever.

Ninth. This defendant denies that the said decree was or is invalid or void for any reason whatsoever or beyond the power of the court to grant, or that there was no foundation for such
332 decree or jurisdiction in the court to award it, or that the
same was entered by consent or agreement or without investigation or adjudication by the court, or that it was the result of agreement simply or was procured by collusion or fraud or was or is fraudulent or part of any scheme alleged in the amended bill of complaint or in disregard of the provisions of the terms of the mortgages, or that the defenses interposed in the suit were abandoned or withdrawn as a part of any wrongful or fraudulent scheme, or that such defenses were never submitted to the court for adjudication or investigation, or that the stockholders of the Houston and Texas Central Railway Company were not in any way advised or permitted to be informed of the transactions referred to in the said amended bill, or that their rights were not considered or protected in and by the said decree, or that said decree contains no finding by the court fixing the amount due from the Houston and Texas Central Railway under the said several mortgages or fixing the amount which said company was required to pay to redeem its franchises, property, and rights from the lien of the mortgages, or that the decree aforesaid contradicts any provisions of several mortgages or is non-judicial or void for the reasons alleged in the

amended bill or for any reason. On the contrary, this defendant alleges that the provisions of said decree in that behalf were and are in all respects regular and sufficient and in the usual form, and further alleges on information and belief that there were and are no person, persons, corporation, or corporations both willing and
able to pay even the amount of interest in default on said
333 bonds secured by said mortgages respectively or to redeem
the said railway and property from the liens of said several
mortgages.

Tenth. This defendant has no knowledge or information sufficient to form a belief as to the names of any persons who are referred to in the article or subdivision of the amended bill of complaint numbered 11 as the "associates" of said Huntington, but denies that said Huntington has, with or without any associates, filed or caused to be filed any articles of incorporation under the laws of Texas organizing or incorporating any railway company known as Houston and Texas Central Railroad Company for the purpose of operating the said or any railway or its franchises. It alleges that the defendant Frederic P. Olcott became the purchaser of a portion of the said line of railway at the foreclosure sale and caused articles of incorporation to be filed under the laws of Texas for the purpose of creating a corporation to acquire the said line of railway so purchased by him, known as the Houston and Central Railroad Company, which is this defendant corporation.

It denies all and singular the allegations contained in the eleventh article or subdivision of said bill with respect to the so-called assessment therein referred to, and it denies the several allegations contained in the twelfth article or subdivision of said bill.

Eleventh. This defendant denies that the interests of the stock-
holders of the old company have not been properly protected
334 or that any collusive judgments have been entered in the suits
referred to in the amended bill of complaint.

It admits that the complainants were not individually parties to the foreclosure suit.

It alleges that the agreement of reorganization was made December 20th, 1887, and that it was made public about the same time, and that its terms and provisions were duly advertised in the public press as well as in financial journals and were matters of general knowledge among bankers in the city of New York and persons engaged in transactions relating to railway securities.

That the said decree of foreclosnre and sale was made and entered May 4th, 1888, and that its entry was announced in the public press and was well known in financial circles; that the sale of said railway and property was made on the 8th day of September, 1888, and was fully advertised, and was also a matter of general knowledge; and this defendant alleges that the complainants at all times after the making of said reorganization agreement well knew or had full and ample means of knowing of said agreement and of its terms and provisions, and also well knew or had abundant opportunity to know of said decree and entry thereof and of said sale. It denies that it was not until September, 1889, that complainants were permitted to know of or have read a copy of said agreement, or that they were unable to obtain information or knowledge as to any facts relating to the
reorganization, and upon information and belief it alleges
335 that complainants did not, nor did any or either of them, ever
ask for or apply to the Central Trust Company for any such information. It denies that any transactions relative to the said railway or its organization were at any time wrongfully concealed from complainants, or that the rights of shareholders have been disregarded or violated in such reorganization.

And this defendant, while insisting that the said decree and the said plan or agreement of reorganization contained no improper provisions in any way impairing the rights of the complainants or of any of the stockholders of the old company, charges and alleges that the said complainants have unreasonably delayed the assertion of their supposed rights and have been guilty of laches in the premises.

Twelfth. This defendant denies that the proposed new mortgage bonds referred to in said plan of reorganization are about to be placed upon the market, except so far as the same may be so placed upon the market by the several persons who, under the terms and provisions of said plan of reorganization, are entitled to receive the same.

Thirteenth. This defendant admits that at the time of the sale the railway was operated by receivers, as alleged in the 15th article or subdivision of the amended bill of complaint, and that Charles Dillingham was the special master commissioner conducting the sale.

It admits that Charles Dilllngham, E. W. Cave, J. J. Atkinson and Charles Fowler are directors of the Houston and Texas Central Railroad Company.

336 This defendant does not know and is not informed, save by said amended bill, whether or not any other of the matters alleged in the 15th article or subdivision of said amended bill are true. It denies that any of the persons named in said article are acting for their own interest in any manner destructive of the company or of the rights of the shareholders of the old company, or that the complainants have ever made any effort, in good faith or otherwise, to obtain redress at the hands of the officers or directors of the company.

It denies that the complainants have any right to any injunction or to any equitable relief in the premises.

Wherefore this defendant prays for the judgment or decree of this court dismissing the said amended bill of complaint as against this defendant, and that this defendant may have and recover of the complainants its costs and expenses of this suit in that behalf most wrongfully sustained.

BUTLER, STILLMAN & HUBBARD,
Solicitors for Defendant Houston & Texas Central R. R. Co.

ADRIAN H. JOLINE, *Of Counsel.*

(28842.) No. 228. Equity. Filed Nov. 29th, 1890. C. Dart, clerk.

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337 *Replication to Answers of the Railway Co., the Lone Star Land Co., and Huntington. Filed Nov.* 29, 1890.

In U. S. Circuit Court, Eastern District of Texas, at Galveston.

S. W. Carey *et all.*, Complainants,
vs.
The Houston & Texas Central Railway Company *et al.*, Defendants.
No.—.

Replication of complainants in the above cause to separate answers of Collis P. Huntington (original and amended), the Lone Star Land Company, and the Southern Pacific Company.

The complainants, as repliants, saving and reserving all advantage of exception to the manifold insufficiencies of said answers, *per* replication thereto say they will aver and prove their said amended bill to be true and sufficient, and that said answers are untrue and insufficient.

Wherefore they pray relief as in said amended bill set forth.

R. H. LANDALE & JEFF. CHANDLER,
CLARK, DYER & BALINGER,
Sol's for Complainants.

Indorsed: No. 228. Eq. S. W. Carey *et al.*, complainants, *vs.* H. & T. C. R'y Co. *et al.*, def'ts. Replication to answers of the railway Co., the Lone Star Land Co., and Huntington. Filed Nov. 29, 1890. C. Dart, clerk.

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338 *Replication. Filed Jan. 29th*, 1891.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

S. W. CAREY *et al.*, Complainants,
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.*, Defendants.
} No.—. Equity.

Replication of complainants in the above cause to the answer of The Houston and Texas Central Railroad Company, one of the defendants.

These repliants, saving and reserving the advantage of exception to the manifold insufficiencies of said answer, for replication thereto saith—

That they will aver and prove their said bill to be true and sufficient, and that the said answer is untrue and insufficient; whereof they pray relief, as in said bill set forth.

R. H. LANDALE,
JEFFERSON CHANDLER, &
CLARK, DYER & BOLINGER,
Solicitors for Complainants.

Indorsed: No. 228. Equity. S. W. Carey *et al.*, complainants, *vs.* H. & T. C. R'y Co. *et al.*, defendants. Replication. Filed Jan. 29th, 1891. C. Dart, clerk.

2068

No. 221.

Opinion. Filed Nov. 12, 1892.

United States Circuit Court, Eastern District of Texas.

S. W. CAREY *et al.*
v.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.* } No. —.

This cause was before the court in the first instance on a motion for an injunction *pendente lite*. The motion was denied for reasons given at some length. 45 F. R., 422. Both parties having taken such evidence as suited, the cause now comes on for final hearing on the proofs, which change very little the aspect of the case as presented by the pleadings. It has been most thoroughly and exhaustively argued on both sides, both orally and by brief, the discussion ranging over a wide field, covering many propositions of law and equity and of equity practice.

Were it at all likely that the present decision would be taken as a finality in the case, I should be disposed to take up seriatim the questions as presented by counsel and discuss them as elaborately and, perhaps, at as great length as counsel have argued the same in their printed briefs. Under the circumstances, however, I do not deem it necessary to further encumber the record with my conclusions in the case beyond adding a little to what was said in
2069 denying the motion for a preliminary injunction.

Whether the bill of complaint herein is an original one, in the nature of a bill of review attacking a former decree of the court, or is a bill of complaint in continuation of a former suit, or is an original bill to set aside a decree of foreclosure and sale and a sale thereunder, it seems to me that if the court was fully seized of jurisdiction in the suit in which the decree attacked was rendered and the proofs under the present bill do not establish collusion and fraud in the proceedings to the injury of the present complainants, complainants' bill should fail.

I.

As to jurisdiction of the court in the suit in which the decree of foreclosure and sale attacked was rendered:

On the 11th day of February, 1885, Nelson S. Easton and James Rintoul, citizens and residents of the State of New York, claiming

to be trustees under a certain deed of trust granted by the Houston and Texas Central Railway Company on the 1st day of July, 1866, covering the main line of the Houston and Texas Central railway, filed their bill No. 183 of the docket, in the circuit court for the eastern district of Texas, against the Houston and Texas Central Railway Company to enforce and protect the trust property, wherein they prayed for an account for an injunction, for a decree of sale of part of the trust property, and for modified receivership. On the same day the same complainants filed in the same court
2070 another bill against the Houston and Texas Central Railway
Company, No. 184 of the docket, to enforce and protect a trust provided and constituted by another deed of trust dated the 21st day of December, 1870, covering the Western division of the Houston and Texas Central railway and all lands and real estate which then constituted or might thereafter constitute the said Western division of the Houston and Texas Central Railway, and therein, on the facts alleged in the bill, prayed for an account, for an injunction, for a decree of sale of part of the trust property, and for a modified receivership.

The records show that under these two bills service was had. The court took jurisdiction of the trust property and made divers orders in relation to the management and disposition of the same.

On the 16th of February, 1885, the Southern Development Company, a body corporate under the laws of the State of California and a resident of that State, in its own behalf and on behalf of all other persons similarly situated, filed its bill of complaint, No. 185 of the docket, in the circuit court of the United States for the eastern district of Texas, against the Houston and Texas Central Railway Company, therein averring, among other things, that it was a creditor of the said railway company for large sums of money advanced at various times for supplies, labor, repairs, operating and managing expenses, proper equipment for use and improvement, and other necessary expenses, in amount exceeding six hundred thou-
2071 sand dollars; that the said indebtedness was contracted by
the railway company in consideration of its promise to pay the same out of the earnings of its railway; that the said indebtedness was in equity and good conscience a charge upon the income and property of the said railway; that there had been a diversion of the income of the railway to pay interest on the bonded debt; that by said diversion a lien resulted in favor of the complainant, which

complainant was entitled to have enforced in a court of equity. Said bill also set forth many other facts, particularly the absolutely insolvent condition of the railway company, tending to show the right to the relief prayed for, which was for an accounting, the appointment of receivers to take possession of and operate the railway property, and for a decree for the payment of complainants' claims out of the earnings of the property.

To this bill the Houston and Texas Central Railway Company appeared and filed an answer, and thereafter, upon notice to the defendant, the court took full jurisdiction of the case, appointing receivers for all of the property, real and personal, of the Houston and Texas Central railway, and fully taking the same into the possession of the court.

Thereafter, on the 12th day of March, 1885, the Farmers' Loan and Trust Company, a corporation created by and under the laws of the State of New York and a citizen of said State, brought its bill of complaint against the Houston and Texas Central Railway Company, No. 188 of the docket, therein alleging that complainant was trustee under several mortgages or deeds of trust as follows: 2072 A mortgage or deed of trust, dated June 16th, 1873, covering the Waco and Northwestern division, and also six thousand acres of land per mile of completed road; a mortgage or deed of trust, dated October 1st, 1872, covering the main line and the Western division of the Houston and Texas Central railway, and also three thousand eight hundred and forty acres per mile of completed road; a mortgage or deed of trust, dated May 1st, 1875, covering the Waco and Northwestern division, and six thousand acres of land per mile of completed road; a mortgage, dated May 7th, 1887, to secure a series of bonds, due May 1st, 1887, covering all of the lines of the said railway and all its lands and land grants; a mortgage, dated April 1st, 1881, covering all of the lines of said railway, and ten thousand two hundred and forty acres of land per mile for each mile of completed road on all the lines of said railway company; also all of its town lots.

The bill averred the violation on the part of the railway company of many of its agreements in relation to the trust property, the default of the company in the payment of interest, the insolvency of the company, the pendency of the preceding suits, the jeopardy of the trust property, and prayed for an accounting, a writ of injunction, a decree of sale of part of the trust property, and for a receiver of all and singular the rights, franchises, and property of

every name and nature, including the rolling stock, goods, chattels,
and things in action, including all lands, real estate, tenements,
hereditaments, and all property, of every sort and nature, of
2073 the said defendant, The Houston and Texas Central Railway
Company, with power and full authority to operate said railroad and carry on all the business of said railway company under the protection of the court, with the usual powers of receivers and managers of railroads.

In no one of the cases mentioned can there be any question as to the jurisdiction of the court, so far as the citizenship of the parties is concerned. Under these suits the court was in full, complete, possession, through its receivers, of all the property of the railway company.

In this state of the case the same parties, Rintoul and Easton, trustees under the two several deeds of trust upon which suits Nos. 183 and 184 were based, then came into court, January 21st, 1886, and filed two other bills of complaint for the foreclosure and sale of all the railroad property covered by the said deeds of trust.

To the bill for the foreclosure of the mortgage on the main line complainants made the Houston and Texas Central Railway Company and one Benjamin A. Shepherd, a resident of Texas, defendants, and they alleged as to the Farmers' Loan and Trust Company and as facts upon which the jurisdiction of the court was invoked as follows:

"And your orators further allege that the Farmers' Loan and
Trust Company, as trustees under the said mortgage or deeds of
trust hereinbefore described, will, as your orators believe, be bene-
fited by and it is to their advantage that the judgment and
2074 relief hereinafter prayed for or some part thereof should be
granted to your orators.

"That said property covered by the said first mortgage on said main line, as well as all the other property, assets, and effects of said railway company, being now in the hands of this court by the receivership existing in respect of the same, and your orators thereby being required by law to institute this action in this court and to come before this tribunal in order to reach the property in its possession and to obtain its rights concerning the same, and all the parties interested in the property covered by said mortgage on the main line, as well as on all the other mortgages and property of said railway company, being now before the court in said actions hereinbefore described as Nos. 183, 184, 185, and 188 and on the equity docket of this court, the said Farmers' Loan and Trust Company may and should be a party defendant in this cause, irrespective of its citizenship, and said corporation should be brought in as a defendant herein by the order and direction of this court, and should be bound by the judgment and proceedings herein."

In the bill for the foreclosure of the mortgage covering the Western division they made the same parties defendant and the like averment as to the Farmers' Loan and Trust Company and the jurisdiction of the court.

The facts alleged being true and of record, the jurisdiction
2075 of the court to enter a decree of foreclosure and sale of the
property covered by the mortgages described seems complete.

In the case of The Morgan's Company *v.* The Texas Central Railway, 137 U. S., 171, which was, in most respects, affecting jurisdiction similar to the case under consideration, differing only in the minor matter of the names given to the pleadings, the supreme court, after a discussion of the cross-bills and their nature and after deciding that in that case the bill filed by the Farmers' Loan and Trust Company was correctly styled a cross-bill, said:

"And whether this bill be regarded as a pure cross-bill, as an original bill in the nature of a cross-bill, or as an original bill, there is no error calling for the disturbance of the decree because the court proceeded upon it in connection with the other pleadings. The jurisdiction of the circuit court did not depend upon the citizenship of the parties, but on the subject-matter of the litigation. The property was in the actual possession of that court, and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control."

Citing Minnesota Com. *v.* St. Paul Co., 2 Wall., 609; People's Bank *v.* Calhoun, 102 U. S., 256; Krippendorf *v.* Hyde, 110 U. S., 276.

2076

II.

The record and proofs do not show that the decree complained of was effected with collusion or fraud, to the prejudice of the complainants. In the first place, the complainants as stockholders have not been injured by the decree and sale thereunder, but rather benefited. Before the decree their interest as stockholders was subject to many millions of bonded indebtedness bearing a high rate of interest and to the payment of a vast floating debt. The result of the sale and the reorganization thereunder is that without increasing the amount, the interest upon the bonded debt has been largely reduced, long-time bonds substituted, and the amount of the floating indebtedness is not increased.

Complainants contend that the decree complained of was a consent decree obtained by collusion between the creditors of the company and the Southern Pacific Company, by which the defendant railroad company was precluded from making proper defences to the suits for forclosure. This contention is not borne out by the proofs. The answers of the railway company were not withdrawn. Testimony in the suit was taken, in fact the record teemed with evidence in the nature of admissions by all the parties tending to show the justice of the creditors' demands and the fact that the railroad company had no meritorious defence. The vast amount of floating indebtedness was not and could not be denied. The insolvency of the company and its utter inability to pay its just
2077 debts and maintain the property as a going concern was admitted on all hands, and could not have been truthfully denied. The sale and reorganization of the property was considered essential in the interest of all concerned. The question of whether or not the principal of the bonds secured by the first main line and Western division mortgages was or had become due because of the defaults of the company and its general failure to comply with its agreements was, it is true, an issuable fact; but, at the same time, it was a fact of minor importance because a sale of the property was necessary on account of the defaults of the company in the payment of interest upon its other bonds secured by mortgages, upon which it was undoubted the principal had become due, and because of the large admitted floating debt pressing for payment.

It was of little interest to the stockholders of the Houston and Texas Central Railway Company (who, so far as the record shows, never proposed to pay anything) whether the principal of the first main line and Western division mortgages was declared due or not, when the interest thereon past due was in amount far beyond the ability of the company to meet, and for which a foreclosure was inevitable, and which, with the foreclosures under the subsequent mortgages for principal and interest conceded to be due, would have extinguished every interest the stockholders possessed.

Nor do the proofs of the case at all satisfy me that there was any collusion. "Collusion is an agreement between two or more

2078 persons unlawfully to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law." Bouvier's Dict.

"Collusion is where two persons, apparently in a hostile position or having conflicting interests, by arrangment do some act in order to injure a third person or deceive a court." Lawrence and Rapalje Dict.

And this case nowhere shows any agreement between any persons, either expressed or implied, to defraud any one, to deceive any court, or that any one has been defrauded or any court deceived. Beyond this the complainants have wholly failed to show that the complainants in the foreclosure suits were cognizant of any misconduct on the part of the defendant, its counsel or its directors, or that they insisted upon or were parties to any agreement by which the interests of the defendant company or its stockholders were really aggrieved.

It may be further noticed in this case that the proofs made do not show such diligence on the part of the complainants as gives them the right to attack, at this time, the decree of sale, the sale thereunder, and the organization agreement.

In this connection what was said by Mr. Justice Patterson, of the New York supreme court, in his opinion in the Gernsheim case, on the identical facts, is very apropos:

"Manifestly, if the reconstruction were carried out in good faith, and the rights of the stockholders were protected and pre-
2079 served, they would have been benefited by the cutting down of interest and fixed charges, and it is not at all a gratuitous assumption that all stockholders would have willingly acquiesced in the reconstruction agreement, provided it was carried out in good faith and without any effort to destroy their interest in such stockholders. It seems to me that it is the result and not the method which has induced the assault upon the proceedings, antedating the levying of the assessment on the stockholders. The reconstruction agreement was made on December 20, 1887. This suit (the Gernsheim suit) was not brought until September, 1889. It is nowhere explained in the moving papers why these plaintiffs remained quiescent for nearly two years without making any demonstration against the reconstruction agreement or the proceedings in the United States court which eventuated in the decree of foreclosure (except as above stated), and it is almost apparent that they were willing to take their chances under that agreement, and to acqui-

esce in all the proceedings that were had pursuant to it, until they ascertained that the heavy assessment of 73 per cent. of which they complained was levied upon them to enable them to take stock in the new corporation."

It is hardly necessary to notice that the complainants do not offer to do equity and pay into the court the amount of the debt of the defendant company, which they concede to be due, or any of
2080 the expenses of foreclosure, nor that the relief they ask under
their bill, if granted, would not only be valueless to them and other stockholders, but would saddle the company with a vast debt of nearly twenty-five millions of dollars wholly due and bearing a high rate of interest.

In my opinion the complainants' bill should be dismissed with costs, and a decree to that effect will be entered.

November 12th, 1892.

DON A. PARDEE,
Circuit Judge.

Endorsed: "No. 228. Equity. S. W. Carey *et al. vs.* The Houston and Texas Central Railway Company *et al.* Opinion. Filed November 12, 1892. C. Dart, clerk."

2081 No. 222.

Decree. Filed Nov. 16, 1892.

United States Circuit Court, Eastern District of Texas.

S. W. CAREY *et als.*
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et als.*

This cause came on to be heard on the bill as amended, replications, and evidence on file, and on a motion of the complainants for a decree against Nelson S. Easton and James Rintoul, trustees; B. A. Shepherd, trustee; Robert Brewster, Gus Mayhoff, and C. L. Beisner, defendants named in the bill and properly served with process, and against whom judgments *pro confesso* have been heretofore entered under the rules of court.

Whereupon, after argument and consideration and for the reasons on file, it is ordered, adjudged, and decreed that the motion for final decree against Nelson S. Easton and James Rintoul, trustees; B. A.

Shepherd, trustee ; Robert Brewster, Gus Mayhoff, and C. L. Beisner be, and the same is hereby, refused, as under the findings and conclusions herein made in favor of the other defendants the relief prayed for is not proper to be decreed.

2082 And it is further ordered, adjudged, and decreed that the bill of complainants, S. W. Carey and others, against the Houston and Texas Central Railway Company and others be, and the same is hereby, dismissed as to all the defendants with costs.

DON A. PARDEE,
Circuit Judge.

November 14th, 1892.

Endorsed: "No. 228. Equity. S. W. Carey *et al. vs.* Houston and Texas Central Railway Co. *et al.* Decree. Filed Nov. 16, 1892. C. Dart, clerk."

2083 223.

Petition for Appeal to Cir. C't of Appeals & Order Thereon.

Circuit Court of the United States for the Eastern District of Texas.

STEPHEN W. CAREY *et al.*, Complainants and Appellants,
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.*,
Defendants and Appellees.

The above-named complainants, conceiving themselves aggrieved by the decree rendered and entered on the 16th day of November, 1892, in the above-entitled cause, do hereby appeal from said decree to the circuit court of appeals for the fifth judicial circuit of the United States, and they pray that their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the circuit court of appeals for the fifth judicial circuit of the United States.

R. H. LANDALE,
Solicitor for Complainants, # 120 *Broadway, New York.*

And now, to wit, on this 3rd day of December, 1892, it is ordered that the appeal be allowed as prayed for.

DON A. PARDEE,
Circuit Judge.

2084 Endorsed: "No. 228. Equity. Circuit court of the United States, eastern district of Texas. S. W. Carey *et al.* *vs.* Houston & Texas Central Railway Company *et al.* Petition for appeal to the circuit court of appeals. Filed Dec. 5th, 1892. C. Dart, clerk."

2085 224.

Petition for Appeal to Supreme C't and Order Thereon.

Circuit Court of the United States for the Eastern District of Texas.

STEPHEN W. CAREY *et al.*, Complainants & Appellants,
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY CO. *et al.*, Defendants & Appell*ants*.

The above-named complainants, conceiving themselves aggrieved by the decree rendered and entered on the 16th day of November, 1892, in the above-entitled cause, do hereby appeal from said decree to the Supreme Court of the United States, and they pray that their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

R. H. LANDALE,
Solicitor for Complainant, # 120 *Broadway, New York.*

And now, to wit, on this 3d day of December, 1892, it is ordered that the appeal be allowed as prayed for.

DON A. PARDEE,
Circuit Judge.

Endorsed: "No. 228. Equity. United States circuit court, eastern district of Texas. S. W. Carey *et al vs.* Houston & Texas Central Railway Company *et al.* Petition for appeal to the
2086 Supreme Court of the United States. Filed December 5, 1892. C. Dart, clerk."

2087 No. 225. Compared.

Assignment of Errors on Appeal to Circ't Court of Appeals.

Circuit Court of the United States for the Eastern District of Texas.

STEPHEN W. CAREY *et al.*, Complainants and Appellants,
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.*, Defendants and Appellees.

And now come Stephen W. Carey, Warren S. Sillcocks, J. Van Schaick, D. P. Ingraham, Jr., James Landale, George Wilson, and Andrew S. McClelland, the complainants herein, by R. H. Landale, their solicitor, and in connection with their appeal from the decree herein of the circuit court of the United States for the eastern district of Texas, the Hon. Don A. Pardee, judge, presiding at the trial of said cause, dismissing their amended bill of complaint, make and file the following assignments of error:

1st. That the court erred in ordering, adjudging, and determining that the complainants' amended bill of complaint be dismissed, because said bill upon its face, together with the evidence, adduced, showed that complainants were entitled in equity to the relief prayed for.

2nd. That the court erred in not awarding a decree in favor of complainants, as prayed for in the amended bill of complaint, because the complainants showed themselves entitled in equity to the relief prayed for.

3rd. That the court erred in not rendering final judg-
2088 ment as prayed for in the amended bill of complaint, against
the defendants Nelson S. Easton and Jas. Rintoul, trustees, in the main line first mortgage and the Western division first mortgage upon the lines and property of the Houston & Texas Central Railway Company, Benj. A. Shepherd, trustee, in the income and indemnity mortgage upon the lines and property of the Houston & Texas Central Railway Company and others, because they and each of them failed to answer, plead, or demur to the amended bill of complaint within the times allowed by the rules and practice of the said circuit court, and judgments *pro confesso* were taken against them and each of them, as shown by the record in this cause.

4th. That the court erred in holding, adjudging, and determining that it had no jurisdiction to grant the relief prayed for in the amended bill of complainst against the said trustees of the mortgages mentioned in the third assignment of error, and against whom said judgments *pro confesso* were taken and against whom final judgments were asked.

5th. That the court erred in holding, adjudging, and determining that it had jurisdiction in the consolidated cause No. 198, pending in the said circuit court of the United States for the eastern district of Texas, wherein Nelson S. Easton and James Rintoul, trustees, and others were complainants and The Houston & Texas Central Railway Company and others were defendants.

—. That the court erred in holding, adjudging and determining that it had jurisdiction over the subject-matter and the parties in said consolidated cause No. 198.

2089 7th. That the court erred in holding, adjudging, and determining that it had jurisdiction to foreclose the mortgages sought to be foreclosed in the said consolidated cause No. 198, whereas it should have held, adjudged, and determined that it had no jurisdiction whatever in said suit, for the reason that the parties upon one side were not citizens of a different State from the parties upon the other. as appears from the record.

8th. That the court erred in holding, adjudging, and determining that it had jurisdiction to render the decree in said consolidated cause No. 198, whereas the court should have held the said decree was invalid and beyond the jurisdiction of the court to grant, inasmuch as issues of fact were presented by the pleadings in said cause and never tried, but were ignored by the parties and the court and wholly disregarded, as appears from the record.

9th. That the court erred in holding, adjudging, and determining that it had jurisdiction to make and enter the decree in consolidated cause No. 198, whereas it should have held that the court had no jurisdiction in the premises, and, as appears from the record, that the decree was non-judicial and a mere contract drawn up by some of the parties to said suit and had no judicial character whatever.

10th. That the court erred in holding, adjudging, and determining that it had jurisdiction to render the decree of foreclosure in said consolidated cause No. 198, when it is shown by the record that no evidence was heard or considered by the court in said cause.

2090 11th. That the court erred in holding, adjudging, and determining that it had jurisdiction to render the decree in said consolidated cause No. 198 in violation of the terms of the mortgages foreclosed, whereas the court should have held that said decree was beyond the jurisdiction of the court to grant, inasmuch as it violated the terms of the mortgages, as appears from the record.

12th. That the court erred in holding, adjudging, and determining that it had jurisdiction to render a judgment or decree in consolidated cause No. 198 for amounts largely in excess of all claims of every kind, nature, and character against the Houston & Texas Central Railway Company, and without any evidence to support the same, as fully appears from the record.

13th. That the court erred in holding, adjudging, and determining that it had jurisdiction to foreclose the mortgages sought to be foreclosed in said consolidated cause No. 198 for the principal thereof, whereas the court should have held that the principal of the said mortgages was not due, it so appearing from the record.

14th. That the court erred in holding, adjudging, and determining that it had jurisdiction to foreclose the mortgages sought to be foreclosed in said consolidated cause No. 198, although the principal of said mortgages was not due, as appears from the record.

15th. That the court erred in holding, adjudging, and determining that it had jurisdiction to award the decree in consolidated cause No.
198, directing a sale of the lines of railway of the said Houston
2091 & Texas Central Railway Company, together with the lands
and land grants of said company, whereas the court should have held that it had no power or jurisdiction to direct a sale under the mortgages sought to be foreclosed of the lines of railway until there had been first a sale of the lands and land grants covered by said mortgages.

16th. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct in said consolidated cause No. 198 a foreclosure of the consolidated mortgage, main line and Western division, executed by the Houston & Texas Central Railway Company, whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of said mortgage on the alleged cross-bill filed by the trustees of the said mortgage, in the manner and as shown by the record.

17th. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct in the said consolidated cause No. 198 a foreclosure of the consolidated mortgage, main line and Western division, executed by the Houston & Texas Central Railway Company, whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of the said mortgage on the alleged cross-bill filed by the trustees of the said mortgage in the

manner and as shown by the record, and without any testimony being taken or introduced in support of said alleged cross-bill, it appearing from the record that said alleged cross-bill was filed only three days prior to the entry of said decree, and without notice to parties at interest, and in pursuance of a pretended agreement
2092 between certain parties to the record in said cause.

18th. The court erred in holding, adjudging, and determining that it had jurisdiction to direct in said consolidated cause No. 198 a foreclosure of the consolidated mortgage, Waco & Northwestern division, executed by the Houston & Texas Central Railway Company, whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of the said mortgage on the alleged cross-bill filed by the trustees of the said mortgage in the manner and as shown by the record.

19th. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct in the said consolidated cause No. 198 a foreclosure of the consolidated mortgage, Waco & Northwestern division, executed by the Houston & Texas Central Railway Company, whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of the said mortgage on the alleged cross-bill filed by the trustees of the said mortgage in the manner and as shown by the record and without any testimony being taken or introduced in support of said alleged cross-bill, it appearing from the record that said alleged cross-bill was filed only three days prior to the entry of said decree and without notice to parties at interest and in pursuance of a pretended agreement between certain parties to the record in said cause.

20th. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct in said consolidated cause No. 198 a foreclosure of the income and indemnity mortgage ex-
2093 ecuted by the Houston & Texas Central Railway Company,
whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of the said mortgage on the alleged cross-bill filed by the trustees of the said mortgage in the manner and as shown by the record.

21st. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct in the said consolidated cause No. 198 a foreclosure of the income and indemnity mortgage executed by the Houston & Texas Central Railway Company, whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of the said mortgage on the alleged cross-bill filed by the trustees of the said mortgage in the manner and as shown by the record and without any testimony being taken or introduced in support of said alleged cross-bill, it appearing from the record that said alleged cross-bill was filed only four days prior to the entry of said decree and without notice to parties at interest and in pursuance of a pretended agreement between certain parties to the record in said cause.

22nd. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct the sale of the property of the Houston & Texas Central Railway Company before entering final decree in said foreclosure proceedings, and in holding, adjudging, and determining that the decree in said cause was final, whereas it should have held that it had no jurisdiction in the premises, and that said decree was only at best interlocutory in form, as appears from the record.

23rd. That the court erred in holding, adjudging, and de-
2094 termining that it had jurisdiction to and properly did confirm the sale of the property of the Houston & Texas Central Railway Company under said decree in consolidated cause No. 198, whereas it should have held that the alleged order confirming the sale was void and beyond the jurisdiction of the court to grant for the reason herein assigned as error and as appears from the record.

24th. That the court erred in refusing to grant a decree in favor of the complainants setting aside the sale made under the decree in consolidated cause No. 198, the same being void and beyond the jurisdiction of the court to authorize.

25th. That the court erred in holding, adjudging, and determining that the decree in consolidated cause No. 198 was valid, whereas it should have held that the same was void and without jurisdiction in the court to grant, because, as appears from the record, the alleged indebtedness of the Houston & Texas Central Railway Company to the trustees in the respective mortgage sought to be foreclosed was never ascertained judicially by the court and was not referred to any master in chancery to be ascertained and was not prior to said decree of the sale thereunder or the confirmation of the said sale ascertained by the court in any manner.

26th. That the court erred in considering the record in a certain suit commenced in the United States circuit court for the eastern district of Texas, wherein Nelson S. Easton and James Rintoul,

trustees, were complainants and the Houston & Texas Central Rail-
way Company was defendant, and known upon the docket
2095 as cause No. 183, whereas the court should have refused to
consider the said cause or any proceedings taken therein as
not being properly before it and not part of the testimony or record introduced in this cause.

27th. That the court erred in holding, adjudging, and determining that it had jurisdiction in said consolidated cause No. 198 by reason of the commencement and pendency in said court of a suit heretofore brought in the United States circuit court for the eastern district of Texas by Nelson S. Easton and Jas. Rintoul, trustees, against the Houston & Texas Central Railway Company and known upon the docket as cause No. 183.

28th. That the court erred in holding, adjudging, and determining that it had jurisdiction in consolidated cause No. 198 and to render a decree therein because of the commencement of a certain suit in the United States circuit court for the eastern district of Texas, wherein Nelson S. Easton and James Rintoul, trustees, were complainants and The Houston & Texas Central Railway Company was defendant, and known upon the docket as cause No. 183, because, as appears from the record, said cause No. 183 was an independent suit having no connection with consolidated cause No. 198 and was never consolidated therewith.

29th. That the court erred in considering the record in a certain suit commenced in the United States circuit court for the eastern district of Texas, wherein Nelson S. Easton and James Rintoul, trustees, were complainants and The Houston & Texas Central Railway Company was defendant, and known upon the docket as cause
No. 184, whereas the court should have refused to consider
2096 the said cause or any proceedings taken therein as not being
properly before it and not part of the testimony or record introduced in this cause.

30th That the court erred in holding, adjudging, and determining that it had jurisdiction in said consolidated cause No. 198 by reason of the commencement or pendency of a suit theretofore brought in the United States circuit court for the eastern district of Texas by Nelson S. Easton and James Rintoul, trustees, against the Houston & Texas Central Railway Company and known upon the docket as cause No. 184.

31st. That the court erred in holding, adjudging, and determining that it had jurisdiction in the said consolidated cause No. 198 and to render a decree therein, because of the commencement of a certain suit in the United States circuit court for the eastern district of Texas, wherein Nelson S. Easton and James Rintoul, trustee,s were complainants and The Houston & Texas Central Railway Company was defendant, and known upon the docket as cause No. 184, because, as appears from the record,' said cause No. 184 was an independent suit, having no connection with consolidated cause No. 198, and was never consolidated therewith.

32nd. That the court erred in considering the record in a certain suit commenced in the United States circuit court for the eastern district of Texas, wherein The Southern Development Company was plaintiff and The Houston & Texas Central Railway Company, Nelson S. Easton and James Rintoul, trustees, and The Farmers'
2097 Loan & Trust Company, trustee, and others were defendants, and known upon the docket as cause No. 185, whereas the court should have refused to consider the said cause or any proceedings taken therein as not being properly before it and not part of the testimony or record introduced in this cause.

33. That the court erred in holding, adjudging, and determining that it had jurisdiction in said consolidated cause No. 198 by reason of the commencement or pendency of a certain suit theretofore brought in the United States circuit court for the eastern district of Texas, in which The Southern Development Company was complainant and The Houston & Texas Central Railway Company and others were defendants, and known upon the docket as cause No. 185.

34th. That the court erred in holding, adjudging, and determining that it had jurisdiction in said consolidated cause No. 198 and to render a decree therein, because of the commencement of a certain suit in the United States circuit court for the eastern district of Texas, wherein The Southern Development Company was complainant and The Houston & Texas Central Railway Company and others were defendants, and known upon the docket as canse No. 185, because, as appears from the record, said cause No. 185 was an independent suit, having no connection with consolidated cause No. 198 and was never consolidated therewith, and, further, because said cause No. 185 was not pending at the time of the entry of the decree in consolidated cause No. 198, but had long before the entry of said decree been dismissed on demurrer, as appears fully from the record.

2098 35th. That the court erred in considering the record in a certain suit commenced in the United States circuit court for the eastern district of Texas, wherein The Farmers' Loan & Trust Company was complainant and The Houston & Texas Central Railway Company was defendant, and known upon the docket as cause No. 188, whereas the court should have refused to consider the said cause or any proceedings taken therein as not being properly before it and not part of the testimony or record introduced in this cause.

36th. That the court erred in holding, adjudging, and determining that it had jurisdiction in said consolidated cause No. 198 by reason of the commencement or pendency of a certain suit theretofore brought in the United States circuit court for the eastern district of Texas, in which The Farmers' Loan & Trust Company were complainants and The Houston & Texas Central Railway Company was defendant and known upon the docket as cause No. 188.

37th. That the court erred in holding, adjudging, and determining that it had jurisdiction in said consolidated cause No. 198 and to render a decree therein because of the commencement of a certain suit in the United States circuit court for the eastern district of Texas wherein The Farmers' Loan & Trust Company was complainant and The Houston & Texas Central Railway Company was defendant, and known upon the docket as cause No. 188, because, as appears from the record, said cause No. 188 was an independent suit, having no connection with consolidated cause No. 198, and was never consolidated therewith.

2099 38th. That the court erred in holding, adjudging, and determining that it had jurisdiction to appoint or continue receivers of the Houston & Texas Central Railway Company as an incident to and dependent upon the jurisdiction which the court had in certain other actions theretofore instituted against the Houston & Texas Central Railway Company and known upon the docket as causes Nos. 183, 184, 185, and 188.

39th. That the court erred in holding, adjudging, and determining that the complainants were guilty of laches in bringing this proceeding when laches could not be charged against complainants, as appears from the record.

40th. That the court erred in holding, adjudging, and determining that the complainants were guilty of laches in bringing this proceeding, whereas the court should have held that there was no laches on the part of the complainants, as appears from the record.

41st. That the court erred in holding, adjudging, and determining that its jurisdiction to make or to render the decree in consolidated cause No. 198 could not be inquired into by the complainants because they were guilty of laches in this proceeding, whereas the court should have held that there was no laches on the part of complainants, and that since the entry of the decree in consolidated cause No. 198 no equities of innocent parties have intervened and the status of the parties and the property is the same now as at the time of the entry of said decree in consolidated cause No. 198, as appears from the records.

42nd. That the court erred in holding, adjudging, and
2100 determining that the answers of defendants in this proceeding set up equities against the complainants' right to the relief prayed for in the complaint, when the contrary appears from ths record.

43rd. That the court erred in holding, adjudging, and determining that equities appeared in this proceeding binding upon the complainants to do and perform as a condition precedent before they were entitled to the relief prayed for in the amended bill of complaint, the contrary appearing from the record.

44th. That the court erred in holding, adjudging, and determining that any equities arose or existed against the complainants which they were bound or required to discharge before they were entitled to the relief prayed for in the amended bill of complaint, the fact being that no such equities did exist, as appears from the record.

45th. That the court erred in holding, adjudging, and determining that the decree filed in consolidated cause No. 198 was a judicial decree, whereas the court should have held that it was non-judicial and void, and was a mere contract drawn up by certain of the parties to the said suit and had no judicial character whatever, as is shown by the record.

46th. That the court erred in refusing to hold, adjudge, and determine that the complainants and defendants in said consolidated cause No. 198 represented the same interests, as appeared from the record.

47th. That the court erred in holding, adjudging, and determining that the decree in consolidated cause No. 198 was valid,
2101 whereas it should have held that the same was collusive and fraudulent and rendered without any real contest prevailing in the suit in which it was rendered, as appears from the record.

48th. That the court erred in refusing to hold, adjudge, and determine that the directors of the Houston & Texas Central Railway

Company had interests inimical to those of the stockholders of the said company, and that they consented to the contract embodied in and carried out by the decree in consolidated cause No. 198, and that they sacrificed the interests of the stockholders of said company, and that they furthered their individual and private interests to the loss and detriment of said stockholders, as appears from the record.

49th. That the court erred in holding, adjudging and determining that the directors of the Houston & Texas Central Railway Company had power to consent to the contract or arrangement embodied in and carried out by the decree in said consolidated cause No. 198, whereas it should have held that the acts of the said directors were beyond their power, *ultra vires*, and void.

50th. That the court erred in holding, adjudging and determining that it had jurisdiction to render and enforce against complainants the decree in consolidated cause No. 198, when, as is shown from the record, the complainants and defendants in said cause represented in procuring said decree one and the same interest and desired the same result.

2102 51st. That the Court erred in holding, adjudging and determining that it had jurisdiction to enforce against complainants in this suit the decree rendered in the said consolidated cause No. 198, which said decree, as appears from the record, was entered by agreement between the complainants and the defendants in said consolidated cause.

52nd. That the court erred in holding, adjudging and determining in this case that it had jurisdiction to enforce as against complainants in this suit the decree rendered in said consolidated cause No. 198 without any evidence having been heard in said cause to sustain said decree.

53rd. That the court erred in holding, adjudging and determiningthat it had jurisdiction to enforce the decree rendered in consolidated cause No. 198 against complainants in this suit, said decree being interlocutory only and not final, as appears from the record.

54th. That the court erred in holding, adjudging and determining that it had jurisdiction to enforce the decree entered in consolidated cause No. 198 and to uphold the sale thereunder against complainants in this suit, because, as appears from the record, said decree and sale were void in law for the various reasons assigned for error in this cause.

55th. That the court erred in not awarding a decree in favor of the complainants, setting aside the decree in consolidated cause No. 198 as being void and without jurisdiction in the court to grant, for the reasons set forth in the foregoing assignment of errors.

R. H. LANDALE,
Solicitor for Complainants, ♯ 120 *Broadway, New York.*

2103 Endorsed: "No. 228. Equity. United States circuit court, eastern district of Texas. S. W. Carey *et al. vs.* The Houston & Texas Central Railway Company *et al.* Assignment of errors for appeal to circuit court of appeals. Filed December 5, 1892. C. Dart, clerk."

2104 No. 226.

Assignment of Errors on Appeal to Sup. C't.

Circuit Court of the United States for the Eastern District of Texas.

STEPHEN W. CAREY *et al.*, Complainants and Appellants,
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, *et al.*,
Defendants and Appell*ant*s.

And now come Stephen W. Carey, Warren S. Sillcocks, J. Van Shaick, D. P. Ingraham, Jr., James Landale, George Wilson, and Andrew S. McClelland, the complainants herein, by R. H. Landale, their solicitor, and in connection with their appeal from the decree herein of the circuit court of the United States for the eastern district of Texas, the Hon. Don A. Pardee, judge presiding at the trial of said cause, dismissing their amended bill of complaint, make and file the following assignment of errors:

1st. That the court erred in ordering, adjudging, and determining that the complainants' amended bill of complaint be dismissed, because said bill upon its face, together with the evidence adduced, showed that complainants were entitled in equity to the relief prayed for.

2nd. That the court erred in not awarding a decree in favor of complainants, as prayed for in the amended bill of complaint, because the complainants showed themselves entitled in equity to the relief prayed for.

3rd. That the court erred in not rendering final judgment, as
prayed for in the amended bill of complaint, against the de-
2105 fendants Nelson S. Easton and Jas. Rintoul, trustees in the
main line first mortgage and the Western division first mortgage upon the lines and property of the Houston & Texas Central Railway Company; Benj. A. Shepherd, trustee in the income and indemnity mortgage upon the lines and property of the Houston & Texas Central Railway Company, and others, because they and each of them failed to answer, plead or demur to the amended bill of complaint within the time allowed by the rules and practice of the said circuit court and judgments *pro confesso* were taken against them and each of them, as shown by the record in this cause.

4th. That the court erred in holding, adjudging, and determining that it had no jurisdiction to grant the relief prayed for in the amended bill of complaint against the said trustees in the mortgages mentioned in the third assignment of error and against whom said judgments *pro confesso* were taken and against whom final judgments were asked.

5th. That the court erred in holding, adjudging, and determining that it had jurisdiction in the consolidated cause No. 198, pending in the said circuit court of the United States for the eastern district of Texas, wherein Nelson S. Easton and James Rintoul, trustees, and others were complainants and the Houston & Texas Central Railway Company and others were defendants.

6th. That the court erred in holding, adjudging, and determining that it had jurisdiction over the subject-matter and the parties in said consolidated cause No. 198.

7th. That the court erred in holding, adjudging, and determining
that it had jurisdiction to foreclose the mortgages sought to
2106 be foreclosed in the said consolidated cause No. 198, whereas
it should have held, adjudged, and determined that it had no jurisdiction whatever in said suit, for the reason that the parties upon one side were not citizens of a different State from the parties upon the other, as appears from the record.

8th. That the court erred in holding, adjudging, and determining that it had jurisdiction to render the decree in said consolidated cause No. 198, whereas the court should have held the said decree was invalid and beyond the jurisdiction of the court to grant, inasmuch as issues of fact were presented by the pleadings in said cause and never tried, but were ignored by the parties and the court and wholly disregarded, as appears from the record.

9th. That the court erred in holding, adjudging, and determining that it had no jurisdiction to make and enter the decree in consolidated cause No. 198, whereas it should have held that the court had no jurisdiction in the premises, and, as appears from the record, that the decree was non-judicial and a mere contract drawn up by some of the parties to said suit, and had no judicial character whatever.

10th. That the court erred in holding, adjudging, and determining that it had jurisdiction to render the decree of foreclosure in said consolidated cause No. 198, when it is shown by the record that no evidence was heard or considered by the court in said cause.

11th. That the court erred in holding, adjudging and determining that it had jurisdiction to render the decree in said consolidated cause No. 198, in violation of the terms of the mortgages
2107 foreclosed, whereas the court should have held that said decree was beyond the jurisdiction of the court to grant, inasmuch as it violated the terms of the mortgages, as appears from the record.

12th. That the court erred in holding, adjudging, and determining that it had jurisdiction to render a judgment or decree in consolidated cause No. 198 for amounts largely in excess of all claims of every kind, nature, and character against the Houston & Texas Central Railway Company and without any evidence to support the same, as fully appears from record.

13th. That the court erred in holding, adjudging and determining that it had jurisdiction to foreclose the mortgages sought to be foreclosed in said consolidated cause No. 198 for the principal thereof, whereas the court should have held that the principal of the said mortgages was not due, it so appearing from the record.

14th. That the court erred in holding, adjudging, and determining that it had jurisdiction to foreclose the mortgages sought to be foreclosed in said consolidated cause No. 198, although the principal of said mortgages was not due, as appears from the record.

15th. That the court erred in holding, adjudging, and determining that it had jurisdiction to award the decree in consolidated cause No. 198 directing a sale of the lines of railway of the said Houston & Texas Central Railway Company, together with the lands and the land grants of said company, whereas the court should have held that it had no power or jurisdiction to direct a sale under the mortgages sought to be foreclosed of the lines of railway until there had been first a sale of the lands and land grants covered by
2108 said mortgages.

16th. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct in said consolidated cause No. 198 a foreclosure of the consolidated mortgage, main line and Western division, executed by the Houston & Texas Central Railway Company, whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of said mortgage on the alleged cross-bill filed by the trustees in the said mortgage in the manner and as shown by the record.

17th. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct in the said consolidated cause No. 198 a foreclosure of the consolidated mortgage, main line and Western division, executed by the Houston & Texas Central Railway Company, whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of the said mortgage on the alleged cross-bill filed by the trustees in the said mortgage in the manner and as shown by the record and without any testimony being taken or intorduced in support of said alleged cross-bill, it appearing from the record that said alleged cross-bill was filed only three days prior to the entry of said decree and without notice to parties at interest and in pursuance of a pretended agreement between certain parties to the record in said cause.

18th. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct in said consolidated cause No. 198 a foreclosure of the consolidated mortgage, Waco & North-
2109 western division, executed by the Houston & Texas Central
Railway Company, whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of the said mortgage on the alleged cross-bill filed by the trustees in the said mortgage in the manner and as shown by the record.

19. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct in the said consolidated cause No. 198 a foreclosure of the consolidated mortgage, Waco & Northwestern division, executed by the Houston & Texas Central Railway Company, whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of the said mortgage on the alleged cross-bill filed by the trustees in the said mortgage in the manner and as shown by the record and without any testimony being taken or introduced in support of said alleged cross-bill, it appearing from the record that said alleged cross-bill was filed only three days prior to the entry of said decree and without notice to

parties at interest and in pursuance of a pretended agreement between certain parties to the record in said cause.

20th. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct in said consolidated cause No. 198 a foreclosure of the income and indemnity mortgage executed by the Houston & Texas Central Railway Company, whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of the said mortgages on the alleged cross-bill filed by the trustees in the said mortgage in the manner and as shown by the record.

2110 21st. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct in the said consolidated cause No. 198 a foreclosure of the income and indemnity mortgage executed by the Houston & Texas Central Railway Company, whereas the court should have held that it had no power or jurisdiction to direct a foreclosure of the said mortgage on the alleged cross-bill filed by the trustees in the said mortgage in the manner and as shown by the record and without any testimony being taken or introduced in support of said alleged cross-bill, it appearing from the record that said alleged cross-bill was filed only four days prior to the entry of said decree and without notice to the parties at interest and in pursuance of a pretended agreement between certain parties to the record in said cause.

22nd. That the court erred in holding, adjudging, and determining that it had jurisdiction to direct the sale of the property of the Houston & Texas Central Railway Company before entering final decree in said foreclosure proceedings and in holding, adjudging, and determining that the decree in said cause was final, whereas it should have held that it had no jurisdiction in the premises, and that said decree was only at best interlocutory in form, as appears from the record.

23rd. That the court erred in holding, adjudging, and determining that it had jurisdiction to and properly did confirm the sale of the property of the Houston & Texas Central Railway Company under said decree in consolidated cause No. 198, whereas it should have held that the alleged order confirming the sale was
2111 void and beyond the jurisdiction of the court to grant, for the reasons herein assigned as error and as appears from the record.

24th. That the court erred in refusing to grant a decree in favor of the complainants, setting aside the sale made under the decree in consolidated cause No. 198, the same being void and beyond the jurisdiction of the court to authorize.

25th. That the court erred in holding, adjudging, and determining that the decree in consolidated cause No. 198 was valid, whereas it should have held that the same was void and without jurisdiction in the court to grant, as appears from the record, the alleged indebtedness of the Houston & Texas Central Railway Company to the trustees in the respective mortgages sought to be foreclosed was never ascertained judicially by the court and was not referred to any master in chancery to be ascertained, and was not prior to said decree of sale thereunder or the confirmation of the said sale ascertained by the court in any manner.

26th. That the court erred in holding, adjudging, and determining that it had jurisdiction in said consolidated cause No. 198 by reason of the commencement and pendency in said court of a suit theretofore brought in the United States circuit court for the eastern district of Texas by Nelson S. Easton and Jas. Rintoul, trustees, against The Houston & Texas Central Railway Company, and known upon the docket as cause No. 183.

27th. That the court erred in holding, adjudging, and determining that it had jurisdiction in consolidated cause No. 198 and to render a decree therein, because of the commencement of a
2112 certain suit in the United States circuit court for the eastern district of Texas, wherein Nelson S. Easton and Jas. Rintoul, trustees, were complainants and The Houston & Texas Central Railway Company was defendant, and known upon the docket as cause No. 183, because, as appears from the record, said cause No. 183 was an independent suit, having no connection with consolidated cause No. 198 and was never consolidated therewith.

28th. That the court erred in holding, adjudging, and determining that it had jurisdiction in said consolidated cause No. 198 by reason of the commencement or pendency of a suit theretofore brought in the United States circuit court for the eastern district of Texas by Nelson S. Easton and James Rintoul, trustees, against The Houston & Texas Central Railway Company, and known upon the docket as cause No. 184.

29th. That the court erred in holding, adjudging, and determining that it had jurisdiction in the said consolidated cause No. 198 and to render a decree therein, because of the commencement of a certain suit in the United States circuit court for the eastern district of Texas, wherein Nelson S. Easton and James Rintoul, trustees, were complainants and The Houston & Texas Central Railway Company was defendant, and known upon the docket as cause No. 184, because, as appears from the record, said cause No. 184 was an independent suit, having no connection with consolidated cause No. 198 and was never consolidated therewith.

30th. That the court erred in holding, adjudging, and determining that it had jurisdiction in said consolidated cause No.
2113 198 by reason of the commencement or pendency of a certain suit theretofore brought in the United States circuit court for the eastern district of Texas, in which the Southern Development Company was complainant and The Houston & Texas Central Railway Company and others were defendants, and known upon the docket as cause No. 185.

31st. That the court erred in holding, adjudging, and determining that it had jurisdiction in said consolidated cause No. 198 and to render a decree therein, because of the commencement of a certain suit in the United States circuit court for the eastern district of Texas, -herein The Southern Development Company was complainant and The Houston & Texas Central Railway Company and others were defendants, and known upon the docket as cause No. 185, because, as appears from the record, said cause No. 185 was an independent suit, having no connection with consolidated cause No. 198 and was never consolidated therewith, and, further, because said cause No. 185 was not pending at the time of the entry of the decree in consolidated cause No. 198, but had long before the entry of said decree been dismissed on demurrer, as appears fully from the record.

32. That the court erred in holding, adjudging, and determining that it had jurisdiction in said consolidated cause No. 198 by reason of the commencement *of* pendency of a certain suit theretofore brought in the United States circuit court for the eastern district of Texas, in which The Farmers' Loan & Trust Company were complainants and The Houston & Texas Central Railway Company was defendant, and known upon the docket as cause No. 188.

33d. That the court erred in holding, adjudging, and de-
2114 termining that it had jurisdiction in said consolidated cause No. 198 and to render a decree therein, because of the commencement of a certain suit in the United States circuit court for the eastern district of Texas, wherein The Farmers' Loan & Trust Company was complainant and The Houston & Texas Central Rail-

way Company was defendant, and known upon the docket as cause No. 188, because, as appears from the record, said cause No. 188 was an independent suit, having no connection with consolidated cause No. 198 and was never consolidated therewith.

34th. That the court erred in holding, adjudging, and determining that it had jurisdiction to appoint or continue receivers of the Houston & Texas Central Railway Company as an incident to and dependent upon the jurisdiction which the court had in certain other actions theretofore instituted against the Houston & Texas Central Railway Company, and known upon the docket as cause No. 183, 184, 185 and 188.

35th. That the court erred in holding, adjudging, and determining that its jurisdiction to make or render the decree in consolidated cause No. 198 could not be inquired into by the complainants, because they were guilty of laches in this proceeding, whereas the court should have held that there *was* no laches on the part of complainants, and that since the entry of the decree in consolidated cause No. 198 no equities of innocent parties have intervened, and the status of the parties and the property is the same now as at the time of the entry of said decree in consolidated cause No. 198, as appears from the records.

2115 36th. That the court erred in holding, adjudging, and determining that equities appeared in this proceeding binding upon the complainants to do and perform as a condition precedent before they were entitled to the relief prayed for in the amended bill of complaint, the contrary appearing from the record.

37th. That the court erred in holding, adjudging, and determining that any equities arose or existed against the complainants which they were bound or required to discharge before they were entitled to the relief prayed for in the amended bill of complaint, the fact being that no such equities did exist, as appears from the record.

38th. That the court erred in holding, adjudging, and determining that the decree in consolidated cause No. 198 was valid, whereas it should have held that the decree was void and without jurisdiction in the court to grant, as being the result of a wrongful and unlawful conspiracy to deprive the Houston & Texas Central Railway Company and its stockholders of their property, as appears from the record.

39th. That the court erred in holding, adjudging, and determining that it had jurisdiction to render and enforce against complainants the decree in consolidated cause No. 198, when, as is shown from the record, the complainants and defendants in said cause represented in procuring said decree one and the same interest and desired the same result.

40th. That the court erred in holding, adjudging, and determining that it had jurisdiction to enforce against complainants in this
suit the decree rendered in the said consolidated cause No.
1116 198, which said decree, as appears from the record, was
entered by agreement between the complainants and the defendants in said consolidated cause.

41st. That the court erred in holding, adjudging, and determining in this case that it had jurisdiction to enforce as against complainants in this suit the decree rendered in said consolidated cause No. 198 without any evidence having been heard in said cause to sustain said decree.

42nd. That the Court erred in holding, adjudging, and determining it had jurisdiction to enforce the decree rendered in consolidated cause No. 198 against complainants in this suit, said decree being interlocutory only and not final, as appears from the record.

43rd. That the court erred in holding, adjudging and determining that it had jurisdiction to enforce the decree entered in consolidated cause No. 198 and to uphold the sale made thereunder against complainants in this suit, because, as appears from the record, said decree and sale were void in law for the various reasons assigned for error in this cause.

44th. That the court erred in not awarding a decree in favor of the complainants, setting aside the decree in consolidated cause No. 198 as being void and without jurisdiction in the court to grant for the reasons set forth in the foregoing assignment of errors.

R. H. LANDALE,
Solicitor for Complainants, #120 *Broadway, New York.*

2117 Endorsed : "No. 228. Equity. United States circuit
court, eastern district of Texas. S. W. Carey *et al. vs.* Houston & Texas Central Railway Company *et al.* Assignment of errors for appeal to Supreme Court. Filed December 5, 1892. C. Dart, clerk."

2118 No. 227.

Bond on Appeal to Circ't Court af Appeals.

Know all men by these presents that we, S. W. Carey, Warren S Sillcocks, J. Van Schaick, D. P. Ingraham, Jr., Jas. Landale, George Wilson, and Andrew S. McClelland, as principals, and R. B. Hawley and Julius Runge, as sureties, are held and firmly bound unto the Houston & Texas Central Railway Co., Houston & Texas Central Railroad Company, Central Trust Co. of the City of New York, Farmers' Loan & Trust Co. of the City of New York, Nelson S. Easton, Jas. Rintoul, Benj. A. Shepherd, Frederick P. Olcott, Geo. E. Downs, the Southern Pacific Co., Chas. Dillingham, Collis P. Huntington, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E. W. Cave, J. J. Atkinson, A. H. Swanson, Chas. Fowler, Robert Brewster, Gus. Mayhoff, and the Lone Star Land Co. in the full and just sum of ($500.00) five hundred dollars, to be paid to the said Houston & Texas Central Railway Co., Houston & Texas Central Railroad Co., Central Trust Co. of the City of New York, Farmers' Loan & Trust Co. of the City of New York, Nelson S. Easton, Jas. Rintoul, Benj. A. Shepherd, Frederic P. Olcott, Geo. E. Downs, the Southern Pacific Co., Chas. Dillingham, Collis P. Huntington, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E. W. Cave, J. J. Atkinson, A. H. Swanson, Chas. Fowler, Robert Brewster, Gus. Mayhoff, and the Lone Star Land Co., their certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of December, in the year of our Lord eighteen hundred and ninety-two.

2119 Whereas lately, at a regular term of the circuit court of the United States for the eastern district of Texas, in a suit depending in said court between S. W. Carey *et al. vs.* The Houston & Texas Central Railway Co. *et al.*, a final decree was rendered against the said S. W. Carey, Warren S. Sillcocks, J. Van Schaick, D. P., Ingraham, Jr., Jas. Landale, George Wilson, and Andrew S. McClelland, and the said S. W. Carey and others having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Houston & Texas Central Railway Co., Houston & Texas Central Railroad Co., Central Trust Co. of the City of New York, Farmers' Loan & Trust Co. of the City of New York, Nelson S. Easton, Jas. Rintoul, Benj. A. Shepherd, Frederic P. Olcott, Geo. E. Downs, the Southern Pacific Co., Chas. Dillingham, Collis P. Huntington, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E. W. Cave, J. J. Atkinson, A. H. Swanson, Chas. Fowler, Robert Brewster, Gus. Mayhoff, and the Lone Star Land Co., citing and admonishing them to be and appear before the United States circuit court of appeals, to be holden at New Orleans, Louisiana, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said S. W. Carey, Warren S. Sillcocks, J. Van Schaick, D. P. Ingraham, Jr., Jas. Landale, George Wilson, and Andrew S. McClelland shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

2120 R. B. HAWLEY, *Surety.*
JULIUS RUNGE, *Surety.*

S. W. CAREY,
WARREN S. SILLCOCKS,
J. VAN SCHAICK,
D. P. INGRAHAM, JR.,
JAMES LANDALE,
GEORGE WILSON,
ANDREW S. McCLELLAND,
By R. H. LANDALE, *Their Solicitor.*

Approved by—
DON A PARDEE,
Circuit Judge.

Oath to be Taken by Surety.

I, R. B. Hawley, do swear that I am worth, in my own right, at least the sum of five hundred dollars, after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston county, State of Texas, and have property in said State liable to execution worth five hundred dollars or more.

R. B. HAWLEY, *Surety.*

[SEAL.] Sworn to and subscribed before me this the 1st day of December, A. D. 1892, as witness my hand and official seal.

W. L. HANSCOM,
Commissioner U. S. Circuit Court, Eastern District of Texas.

2121 *Oath to be Taken by Surety.*

I, Julius Runge, do swear that I am worth, in my own right, at least the sum of five hundred dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; thatI reside in Galveston county, State of Texas, and have property in said State liable to execution worth five hundred dollars or more.

JULIUS RUNGE, *Surety.*

[SEAL.] Sworn to and subscribed before me this the 1st day of December, A. D. 1892, as witness my hand and official seal.

W. L. HANSCOM,
Commissioner U. S. Circuit Court, Eastern District of Texas.

I certify that R. B. Hawley and Julius Runge, the sureties on the foregoing bond, are personally known to me, and they and each of them are sufficient for the amount thereof.

Attest:

[SEAL.] **C. DART,**
Clerk U. S. Circuit Court, Eastern District of Texas.

2122 Endorsed: "No. 228. Equity docket. United States circuit court, eastern district of Texas, at Galveston. S. W. Carey *et al.* *vs.* Houston & Texas Central Railway Co. *et al.* Bond on appeal to cir. court of appeals. Filed this the 5th day of December, A. D. 1892. C. Dart, clerk."

2123 228.

Bond on Appeal to the Supreme Court.

Know all men by these presents that we, S. W. Carey, Warren S. Sillcocks, J. Van Schaick, D. P. Ingraham, Jr., Jas. Landale, George Wilson, and Andrew S. McClelland, as principals, and R. B. Hawley and Julius Runge, as sureties, are held and firmly bound unto the Houston & Texas Central Railway Co., Houston & Texas Central Railroad Co., Central Trust Co. of the City of New York, Farmers' Loan & Teust Co. of the City of New York, Nelson S. Easton, Jas. Rintoul, Benj. A. Shepherd, Frederic P. Olcott, George E. Downs, the Southern Pacific Co., Chas. Dillingham, Collis P. Huntington, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E. W. Cave, J. J. Atkinson, A. H. Swanson, Chas. Fowler, Robert Brewster, Gus Mayhoff, and the Lone Star Land Co. in the full and just sum of five hundred dollars ($500.00), to be paid to the said Houston & Texas Central Railway Co., Houston & Texas Central Railroad Co., Central Trust Co. of the City of New York, Farmers' Loan & Trust Co. of the City of New York, Nelson S. Easton, Jas. Rintoul, Benj. A. Shepherd, Frederic P. Olcott, Geo. E. Downs, the Southern Pacific Co., Chas. Dillingham, Collis P. Huntington, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E. W. Cave, J. J. Atkinson, A. H. Swanson, Chas. Fowler, Robert Brewster, Gus Mayhoff, and the Lone Star Land Co., their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of December; in the year of our Lord eighteen hundred and ninety-two.

2124 Whereas lately, at a regular term of the circuit court of the United States for the eastern district of Texas, in a suit depending in said court between S. W. Carey *et al. vs.* The Houston & Texas Central Railway Co. *et al.*, a final decree was rendered against the said S. W. Carey, Warren S. Sillcocks, J. Van Schaick, D. P. Ingraham, Jr., Jas. Landale, Geo. Wilson, and Andrew S. McClelland, and the said S. W. Carey and others having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit and a citation directed to the said Houston & Texas Central Railway Co., Houston & Texas Central Railroad Co., Central Trust Co. of the City of New

York, Farmers' Loan & Trust Co. of the City of New York, Nelson S. Easton, Jas. Rintoul, Benj. A. Shepherd, Frederic P. Olcott, Geo. E. Downs, the Southern Pacific Co., Chas. Dillingham, Collis P. Huntington, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E. W. Cave, J. J. Atkinson, A. H. Swanson, Chas. Fowler, Robert Brewster, Gus Mayhoff, and the Lone Star Land Co., citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said S. W. Carey, Warren S. Sillcocks, J. Van Schaick, D. P. Ingraham, Jr., Jas. Landale, George Wilson, and Andrew S. McClelland shall prosecute their appeal to effect and answer all costs if 2125 they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

S. W. CAREY,
WARREN S. SILLCOCKS,
J. VAN SCHAICK,
D. P. INGRAHAM, Jr.,
JAMES LANDALE,
GEORGE WILSON,
ANDREW S. McCLELLAND,
By R. H. LANDALE, *Their Solicitor.*
R. B. HAWLEY, *Surety.*
JULIUS RUNGE, *Surety.*

Approved by—
DON A. PARDEE,
Circuit Judge.

Oath to be Taken by Surety.

I, R. B. Hawley, do swear that I am worth, in my own right, at least the sum of five hundred dollars, after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me;

that I reside in Galveston county, State of Texas, and have property in said State liable to execution worth five hundred dollars or more.

R. B. HAWLEY, *Surety.*

Sworn to and subscribed before me this 1st day of Dec. A. D. 1892.

[SEAL.] As witness my hand and official seal.

W. L. HANSCOM,
Commissioner U. S. Circuit Court, Eastern District of Texas.

2126 *Oath to be Taken by Surety.*

I, Julius Runge, do swear that I am worth, in my own right, at least the sum of five hundred dollars, after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston county, State of Texas, and have property in said State liable to execution worth five hundred dollars or more.

JULIUS RUNGE, *Surety.*

Sworn to and subscribed before me this the 1st day of Dec., A. D. 1892.

[SEAL.] As witness my hand and official seal.

W. L. HANSCOM,
Commissioner U. S. Circuit Court, Eastern District of Texas.

I certify that R. B. Hawley and Julius Runge, the sureties on the foregoing bond, are personally known to me, and they and each of them are sufficient for the amount thereof.

Attest:

[SEAL.] **C. DART,**
Clerk U. S. Circuit Court, Eastern *District of Texas.*

2127 (Endorsed:) "No. 228. Equity docket. United States circuit court, eastern district of Texas, at Galveston. S. W. Carey *et al. vs.* Houston & Texas Central Railway Company *et al.* Bond on appeal to Supreme Court. Filed this the 5th day of December, A. D. 1892. C. Dart, clerk."

2128 229.

Citation on Appeal to Circ't Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Houston & Texas Central Railway Company, the Houston & Texas Central Railroad Company, the Central Trust Co. of the City of New York, the Farmers' Loan & Trust Co. of the City of New York, Nelson S. Easton, James Rintoul, Benj. A. Shepherd, Frederic P. Olcott, George E. Downs, the Southern Pacific Co., Charles Dillingham, Collis P. Huntington, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E. W. Cave, J. J. Atkinson, A. H. Swanson, Charles Fowler, Robert Brewster, Gus. Mayhoff, and the Lone Star Land Co., Greeting:

You are hereby cited and admonished to be and appear before the *the* United States circuit court of appeals for the fifth circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Texas wherein S. W. Carey and others are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this third day of December, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.] DON A. PARDEE,
Circuit Judge.

2129 Endorsed: "No. 228. Equity. S.W. Carey *et als. vs.* The Houston and Texas Central Railway Company *et als.* Citation on appeal to U. S. circuit court of appeals."

2130 230.

Citation on Appeal to Supreme C't.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Houston & Texas Central Railway Co., the Houston and Texas Central Railroad Co., the Central Trust Co. of the City of New York, the Farmers' Loan & Trust Co. of the City of New York, Nelson S. Easton, James Rintoul, Benj. A. Shepherd, Frederic P. Olcott, George E. Downs, the Southern Pacific Co., Charles Dillingham, Collis P. Huntington, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E.W. Cave, J. J. Atkinson, A. H. Swanson, Charles Fowler, Robert Brewster, Gus. Mayhoff, and the Lone Star Land Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States within 30 days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Texas wherein S. W. Carey and others are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants in error, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of December, in the year of our Lord one thousand eight hundred and ninety-two.

DON A. PARDEE,
[SEAL.] *Circuit Judge.*

2131 Endorsed: "No. 228. Equity. S. W. Carey *et als. vs.* The Houston and Texas Central Railway Company *et als.* Citation on appeal to Supreme Court."

Office Supreme Court U. S.
FILED.
APR 6 1893
JAMES H. McKENNEY,
CLERK.

C. G. Burgoyne's Printing Business, 146-150 Centre St.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

S. W. Carey and others
vs.
The Houston and Texas Central Railway Company and others.

No. 1318.

Motion to Advance.

Now, at this time, come the appellants herein, and move this Court to advance Cause No. 1318 on the docket of this Court, entitled Stephen W. Carey *et al.* vs. The Houston and Texas Central Railway Co. *et al.*, and order that the same be heard at this Term, for the following reasons, viz.:

First. Said cause is brought to this Court under the law of March 3d, 1891, on the question of jurisdiction and on the question of the application of the Constitution of the United States to the proceedings had in the Court below in said cause.

Second. Because appellants claim and affirm that the Court below had no jurisdiction to render the judgment and decree found in said record, for the reason that it had neither jurisdiction of the parties to said suit nor of the subject-matter of said suit. Nor had it jurisdiction to render the decree found in the record of said cause, without evidence, without a hearing, without any judicial inquiry, without an accounting and without an ascertainment of debts due from the defendant company, and in excess by a million and a half dollars of all the debts of said company, of every kind and character, and without referring the same to a master to take an account of the indebtedness due, if any, all of which it did do.

THIRD. The Court had no jurisdiction to order a sale of the railway property described in the record on a decree only interlocutory in form, and without any previous ascertainment and declaration in the decree of the amount of debts due for which said railway property was ordered to be sold. That said Court had no jurisdiction to order a sale under said circumstances, nor to confirm the same, nor to dispose of the railway company's property in any manner whatever.

FOURTH. That the Court had no jurisdiction to order the obligations of the defendant railway company to be paid before said debts had become due, as it did order in this case. That the said Court has no bankruptcy jurisdiction or visitorial power to take the property out of the hands of the railway company, except to preserve the property as a trust according to the terms of said trust, or to establish a lien according to the terms of the lien. It had no jurisdiction to use arbitrary power, as it did in this case, to seize and dispose of the property of defendant company without due process of law.

FIFTH. That the Constitution of the United States preserves equity procedure in courts of equity of the United States and requires that before property shall be sold a hearing shall be had, and that the law of equity procedure of the Court in reaching judicial conclusions shall be obeyed by the Court, which was not done in this case ; nor was there any attempt by the Court to obey or observe said law of equity procedure in this case.

Sixth. That it is necessary to advance this cause on the docket in order to preserve the rights of the appellants therein and said defendant company. That while said appellants sue as stockholders for their own benefit and that of other stockholders, the suit is one to vindicate the rights of the corporation itself. That no innocent purchasers have become involved in the property, and if the case is now speedily heard the rights of all persons interested will be fully and amply protected. That the questions of jurisdiction in the foreclosure proceedings form a part of the case brought here on appeal as has been frequently decided by this Court, and a reference to such decisions is hereby submitted in a brief accompanying this motion.

Wherefore, appellants pray that this motion be granted, and said cause be set forward on the docket of of this Court and that a speedy hearing thereof be ordered for some day convenient to the Court prior to the day of adjournment thereof.

Jefferson Chandler,
A. J. Dittenhoefer,
Attorneys for Appellants.

Office Supreme Court U. S.
FILED.
APR 6 1893
JAMES H. McKENNEY,
CLERK.

C. G. Burgoyne's Printing Business 146-150 Centre St

SUPREME COURT OF THE UNITED STATES.

S. W. Carey and others

vs.

The Houston and Texas Central Railway Company and others.

No. 1318.

Brief on Motion to Advance.

The precise legal effect of the Carey bill was, and is, to introduce Carey, and the stockholders joining him as complainants in said bill, into the foreclosure proceedings against the defendant company, which company had then and theretofore deserted its corporate trust. That said introduction of said Carey and others, as parties in said foreclosure proceedings to preserve the trust which said defendant company had deserted, operated then and there to continue the said foreclosure proceedings. The filing of Carey's bill was the sole means known to equity practice by which Carey and others *cestui que trust* of the corporation in the foreclosure proceedings could rescue the deserted trust.

The introduction of Carey and others into the foreclosure proceedings in their incomplete state was not the institution of an independent suit, but was, in contemplation of equity practice, a mere continuation of the old incomplete foreclosure proceedings. Carey's bill disclosed reasons why the foreclosure proceedings should be arrested and corrected, and the abuses of power therein cured.

It is a misapprehension of the case to say that there are two independent suits. There is but one, which is made up of the erroneous foreclosure proceedings with its abuses of power, coupled with the attempt of Carey and others interested in the trust property involved, to vindicate the very trust under color of which said foreclosure proceedings were tolerated. Carey and others did not try to save their personal interests merely in the trust, but they seek to preserve the whole trust as a unit.

There is but one trust involved in the original foreclosure proceedings and the supplemental Carey proceedings. The trustee was permitting a perversion of the trust in Court, and the *cestui que trust*, under the rules of equity practice in such cases, comes in to arrest the perversion.

In the case of the Willamette Iron Bridge Company vs. Hatch, 125 U. S., 7, 8 and 17, it was held that a question of the lack of jurisdiction in the trial Court, in an original proceeding before that Court, was taken to the Supreme Court in an appeal from the judgment dismissing the bill of review, which bill of review set up want of jurisdiction in the original proceeding.

That is the very point involved in the Carey case. Carey's bill alleged want of jurisdiction in the foreclosure proceeding, and was dismissed; the bill impeached a foreclosure decree on the ground of want of jurisdiction in the Court to render the decree, and on other additional grounds. An appeal from the decree dismissing Carey's bill brings before the Appellate Court the questions of jurisdiction involved in the original foreclosure proceedings, to which attention is called in the Carey bill, and which appeared on the face of the record in the foreclosure proceedings, all of which proceedings were made a part of the Carey bill and are brought by appeal to this Court.

In the foreclosure proceedings there was no jurisdiction in the Court below, because the plaintiffs and defendants therein were citizens of the same State, which appears on the face of the record, and no jurisdiction to violate in its procedure the Constitution of the United States, the laws of Congress and the rules of Court.

In Ensminger vs. Powers and wife, 108 U. S., 293, the Court say: "It is shown that the proper forms of the administration of justice were disregarded. The functions of the Judge were abrogated; there was no hearing or decision by the Court, and the counsel for defendant was allowed to prepare and enter such decree as he chose."

In 13 Peters, page 15, the case of Whiting vs. Bank of the United States, a bill of review is declared to rest upon errors on the face of the decree assailed. In that case the record in which the decree was rendered was not brought up, as was done in this case; yet the Court considered the alleged errors on the face the original decree assailed by the bill of review.

Where the majority of a company propose to benefit themselves at the expense of the minority the Court may interfere to protect the minority. In such a case the bill is rightfully filed by the one shareholder on behalf of the others and against the company (Menier vs. Hoopers Telegraph Works, 9th Chancery Appeals, 350) The Chancellor says in that case: "It is said the case made by the bill is shortly this: The defendants, who have a majority of the shares in the company, have made an arrangement by which they have dealt with matters affecting the whole company, the interest in which belongs to the minority as well as to the majority. They have dealt with them in consideration of their obtaining for themselves certain advantages. A majority of the shareholders say, in effect, that the majority have divided the assets of the company more or less between themselves to the exclusion of the minority. I think it would be a shocking thing if that could be done, because, if so, the majority might divide the whole assets of the company and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it. Assuming the case to be as alleged in the bill, then the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the Court can do it. It is said, however, that this is not the right form of suit, because according to the principles laid down in Force vs. Harbottle, and other similar cases, the Court ought to be very slow indeed in allowing a shareholder to file a bill where the company is the proper plaintiff. This particular case seems to me precisely one of the exceptions referred to by Vice-Chancellor Wood in Atwater vs. Merryweather, 5th Equity Force, 54, a case in which a majority of the defendants are wrongdoers who were alleged to have put the minority profit into their pocket. In this case it is right and proper for a bill to be filed by one shareholder on behalf of himself and of the other shareholders."

This doctrine is too well settled in this country to need authorities, but we cite Dodge vs. Woolsey, 18 How., 331, and Hawes vs. Oakland, 104 U. S., 450.

In this case the questions of jurisdiction in the foreclosure proceedings and all the errors and abuses of authority in said proceedings occurring are here before the appellate court for adjudication. The whole record in the foreclosure proceedings is incorporated in and made a part of the record in the Carey suit.

Respectfully submitted,

JEFFERSON CHANDLER,
A. J. DITTENHOEFER,
Attorneys for Appellants.

Office Supreme Court U. S.
FILED.
APR 8 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

STEPHEN W. CAREY ET AL.

vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY ET AL.

No. 1318.

Statement of Appellees in Answer to Motion to Advance.

The Appellees have been served with notice of a motion by the Appellants to advance this case. .

The decree of the Circuit Court dismissing the bill of the appellants, who were complainants below, was rendered on November 16, 1892, and an appeal was taken directly to this court, but the transcript of the Record was not filed in the clerk's office until a few days ago, and has, of course, not been printed.

The Appellees desire to state, in answer to the motion to advance, that it is their intention to move to dismiss the present appeal for want of jurisdiction, and that such a motion will be made without unnecessary delay.

BUTLER, STILLMAN & HUBBARD,
ADRIAN H. JOLINE,
J. HUBLEY ASHTON,
Of Counsel for Appellees.

Office Supreme Court U. S.
FILED.
OCT 4 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 912.

STEPHEN W. CAREY AND OTHERS,
Appellants,

vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY AND OTHERS,
Appellees.

Motion of Appellees to Dismiss the Appeal and their Brief of Argument in Support of the Motion.

J. HUBLEY ASHTON,
CHARLES H. TWEED,
ADRIAN H. JOLINE,
Of Counsel for Appellees.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States.

OCTOBER TERM, 1892.

STEPHEN W. CAREY and others,
Appellants,
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY and others.

No. 912.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Motion to Dismiss the Appeal.

Now the Central Trust Company of New York, Frederic P. Olcott, The Houston and Texas Central Railroad Company, Collis P. Huntington, The Southern Pacific Company, George E. Downs, The Houston and Texas Central Railway Company, Charles Dillingham, Isaac E. Gates, J. G. Schriever, A. C. Hutchinson, E. W. Cave, J. J. Atkinson, A. H. Swanson, Charles Fowler and the Lone Star Land Company, appellees in the above-entitled case, by J. Hubley Ashton, Charles H. Tweed and Adrian H. Joline, their counsel, appearing specially for the making of this motion, move the Court to dismiss the appeal to this Court in the above-entitled case, as this Court has no jurisdiction thereof or power to entertain the same, and in support of this motion they aver and show as follows:

1. That the case in which the said appeal was taken from the final decree of the said Circuit Court, rendered November 16, 1892, dismissing the bill of complaint therein, is not one mentioned and provided for in Section 5 of the Judiciary Act of March 3, 1891,

Chap. 517, and the said decree of the said Circuit Court is not directly the subject of appeal to or reviewable by this Court under Section 5 of said act of Congress.

2. That the jurisdiction of the Circuit Court of the UnitedStates for the Eastern District of Texas was not "in issue" in the said case, and no question involving the jurisdiction of the said Circuit Court over the said case, was "in issue" therein; and no question of the jurisdiction of the said Circuit Court was certified by that Court to this Court for decision.

3. That the said case is not one that involved the construction or application of the Constitution of the United States.

4. That the said case is not one in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question; nor is it one in which the Constitution or law of a State was claimed to be in contravention of the Constitution of the United States.

5. That it appears by the transcript of the record herein that at the time the said appellants prayed the said appeal to this Court from the said final decree of the said Circuit Court, they also took an appeal from the same decree to the Circuit Court of Appeals for the Fifth Circuit; and such appeal is now pending in the said Circuit Court of Appeals.

J. Hubley Ashton.
Charles H. Tweed.
Adrian H. Joline.
Counsel appearing specially for Appellees.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1893.

S. W. CAREY, and others,
Appellants,
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, and others.
No. 912.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES IN SUPPORT OF THEIR MOTION TO DISMISS THE APPEAL.

Statement.

This is a motion to dismiss an appeal from the final decree of the Court below, rendered on the 16th of November, 1892, dismissing a bill in chancery (No. 228 in the Circuit Court of the United States) exhibited by the complainants and appellants, S. W. Carey and others, as owners of certain shares of the capital stock of the Houston and Texas Central Railway Company, seeking to vacate and set aside, upon the ground of alleged collusion and fraud, a decree of foreclosure and sale entered by the Court below, on May 4, 1888, in a suit instituted therein (No. 198, Consolidated, in the Circuit Court) to foreclose certain mortgages upon the property of that Company, and to enjoin and restrain the defendants from carrying out a certain plan of reorganization, and issuing any stock or securities of the new company incorporated pursuant to such plan.

This suit was instituted by a bill filed in the Court below on December 23, 1889, which is called the original bill *(Extracts from Record*, pp. 1-27*)*.

On March 3, 1890, the complainants asked and obtained leave to file an amended bill of complaint against the defendants therein named, and it was upon that bill, and the answers thereto, and the proofs of the parties, that the case was disposed of by the final decree from which the present appeal was taken.

The nature and objects of the suit will appear from a brief abstract of the amended bill of complaint in the case, as follows (*Amended Bill, Extracts from Record*, pp. 28–54):

The references to the record are to the printed extracts submitted with this motion.

The complainants in the bill were one S. W. Carey, a citizen and resident of the State of New Jersey, and six other persons, citizens of New York and Great Britain respectively, who purported to sue as stockholders of the Houston and Texas Central Railway Company, in their own behalf and in behalf of all others similarly situated.

The defendants were The Houston and Texas Central Railway Company (No. 1), The Houston and Texas Central Railroad Company (No. 2), corporations under the laws of the State of Texas; The Central Trust Company of the City of New York, a corporation under the laws of New York; The Farmers' Loan and Trust Company, as trustee, also a corporation under the laws of New York, and a number of other corporations and individuals, respectively, citizens of Kentucky, Texas, New York and Louisiana.

The bill alleged that the Houston and Texas Central Railway Company, between July, 1866, and April, 1881, executed seven mortgages or deeds of trust to different trustees as security for bonds issued by it, amounting to many millions of dollars (pp. 31–35).

It averred that in and prior to 1883, the defendant Huntington, who with his associates controlled the Southern Development Company (a corporation under the laws of California), formed a syndicate with his associates for the purpose of acquiring in his own interest, and that of the Southern Development Company, the control of the Houston and Texas Central Railway Company; and that having obtained such control, all rights of the holders of the stock were sought to be effectually shut out and barred, and the absolute control of the company acquired by said syndicate, so that the railway might be run solely in the interest of said syndicate, and the Southern Pacific Company (p. 36).

The bill alleged that in January, 1885, when the holders of the first mortgage bonds presented their coupons for payment, it was fraudulently and wrongfully contrived by said Huntington and his associates that said coupons were cashed and secretly taken up by the Southern Development Company, without notice to the holders thereof; that thereupon the said company commenced a suit against the Houston and Texas Central Railway Company, in the Circuit Court of the United States for the Eastern District of Texas, claiming that the latter company was indebted to it in the sum of $600,000 for money loaned and advanced at various times during the preceding six years to take up coupons and for other purposes; and, that in February, 1885, the appointment of Receivers was procured in said action, the order being made with the consent of said railway company, through its solicitors (p. 37).

The bill then went on to allege that on January 21, 1886, the defendants Easton and Rintoul (alleged to be citizens of New York), trustees, filed two bills in the said Circuit Court for foreclosure, and, subsequently, on April 20, 1886, the Farmers' Loan and Trust Company filed a bill in that court, which said bills were described as Nos. 198, 199 and 201, respectively; and that at May Term, 1886, all the parties consenting, the cases were consolidated as No. 198 (p. 37).

It averred that at said May Term, the suit of the Southern Development Company was dismissed, and thereupon the defendants, Easton, Rintoul and Dillingham, were appointed joint Receivers of the Houston and Texas Central Railway Company in said consolidated cause, the company, through its counsel, consenting (p. 37).

The bill alleged that in none of the mortgages was it provided that the failure to pay interest upon any of the bonds should be taken to precipitate the maturity of the principal, nor did they provide for or permit the sale of the railway prior to the maturity of the principal of the bonds referred to in the respective mortgages, and that the answer of the railway company in said suits expressly placed in issue, by denying, that the principal sum of the said bonds had become due or demandable, and averring that the Court had no power to decree a sale of the railway prior to the maturity of the bonds or prior to the sale of the lands covered by the mortgages (pp. 38-39).

It was then alleged that on or about December 27, 1887, an agreement was entered into by a majority of the holders of the mortgage bonds (with the possible exception of those on the Waco and

Northwestern Division), the Southern Pacific Company, and the Central Trust Company, for the reorganization of the Houston and Texas Central Railway Company; that, in pursuance of the scheme mapped out, the complainants in said consolidated cases, applied for, and, on consent, procured to be entered, a decree therein, filed May 4, 1888, for the foreclosure of the said mortgages and a sale of the said property; and that the property was offered for sale under said decree, and sold on September 8, 1888 to the defendant Frederic P. Olcott, the President of the Central Trust Company, for the sum of $10,580,000, excepting the Waco and Northwestern Division, which was sold to defendant, Downs, for defendant Huntington and his associates (pp. 40–46).

The bill charged that "the said decree was and is absolutely invalid and void and beyond the power of the Court to grant; that there was no foundation for said decree, or jurisdiction in the Court to award, and that the same was entered by consent and agreement and without any investigation or adjudication by the Court, but was the result of agreement simply, and was procured (as complainants allege on information and belief) by collusion and fraud on the part of said Huntington and his associates and the directors and officers of said Houston and Texas Central Railway Company, and was and is a part of the scheme to acquire possession of said railway in the interest of said Huntington and the Southern Pacific Company without regard to the rights or interests of the holders of the stock of the said company No. 1, and in direct disregard of the terms and provisions of the mortgages; that the defenses interposed—that the principal of the mortgages had not become due, and that the railway could not be sold without a sale first of the lands, and the other defenses interposed—were substantially abandoned and withdrawn as part of the said wrongful and fraudulent scheme herein referred to; that the decree was the result of the agreement which the bondholders had made with the Southern Pacific Company and the Central Trust Company, and the rights of the stockholders were not considered or protected by any of the parties to the record in said cause" (p. 46).

It was averred that the decree is non-judicial and void (p. 47).

The bill proceeded to allege that on acquiring the possession of said railway under the foreclosure sale, defendant Huntington and his associates caused to be filed articles of incorporation under the laws of Texas, organizing a company known as the Houston and Texas Central Railroad Company (designated in the bill as No. 2) for the purpose of operating the railway, and, thereupon, on or about

September 1, 1889, issued a notice to the stockholders of the Houston and Texas Central Railway Company (No. 1) that they could participate in the new company, provided they pay an assessment of seventy-three dollars upon each share of stock held by them; that said assessment is an attempt to compel the stockholders of company No. 1 to turn over their stock to said Huntington and his associates, and to purchase from them stock in the new company; and that complainants, on learning of said assessment, were thereby warned of the wrongful and fraudulent nature of the said transactions, which they at once took steps to investigate (pp. 47-50).

The bill averred that the said new company is capitalized to the amount of $10,000,000, and it is intended to issue the mortgage bonds referred to in the plan of reorganization, and place the same upon the market; wherefore, immediate action by the equitable interposition of a court of equity is essential (p. 50).

It was alleged that the directors acted and are acting in the interest of said Huntington and his syndicate and the Southern Pacific Company, and have interests inimical to those of complainants and other stockholders; that any notice to the Board of Directors, or any of them, to institute suit to vacate said decree and sale, or appeal therefrom, would be a futile formality; that complainants have made an earnest effort to obtain redress at the hands of the directors and shareholders; and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no jurisdiction (pp. 51-52).

The prayer of the bill was that the decree rendered by the Court below on May 4, 1888, in said consolidated cause in the suit of Nelson S. Easton and James Rintoul, trustees, and the Farmers' Loan and Trust Company, as trustee, against the Houston and Texas Central Railway Company and others, be vacated and set aside and adjudged and decreed to be fraudulent, collusive, illegal and void, and that complainants be permitted to intervene and become parties defendant in said suit, and to be heard and defend the same; that the sale of the railroad and lands of the Houston and Texas Central Railway Company No. 1, under said decree, be vacated and set aside, and the said railway and lands restored to the possession of the Receivers appointed by this Court; that the defendants be enjoined temporarily and perpetually from executing, delivering or recording any mortgage upon the property of the company referred to in said decree, and from issuing, alienating or parting with any shares of stock of the new or reorganized Houston and Texas Central Railroad Company (No. 2), or any bonds secured by mortgage upon any property claimed to be possessed by said company, or any stock or bonds issued or intended so to be pursuant to said reorganization agreement ; and for further relief (pp. 53-54).

General demurrers to this bill for want of equity were interposed, in the first instance, by several of the defendants.

The demurrers were afterwards withdrawn, and the defendants answered the bill.

The answers denied the allegations upon which the complainants sought to impeach the validity and integrity of the decree of the Court below in the foreclosure proceedings against the Houston and Texas Railway Company, and the other transactions referred to in the bill, and averred the regularity, validity, integrity and good faith of all the proceedings and transactions assailed by the bill (pp. 55-141).

Replications to the several answers were filed by the complainants (p. 141).

The cause being thus at issue, the complainants took their evidence in support of the bill, and the defendants took their evidence in defense, and the same was returned to and filed in the Court below.

Before the final hearing, the complainants moved for an injunction *pendente lite*, which the Court, upon full consideration, denied. (Carey vs. Houston & T. C. Ry. Co., March, 1891, 45th Federal Reporter, p. 438).

On March 15, 1892, an order was entered setting the cause down for final hearing upon the pleadings and proofs.

On November 16, 1892, the Circuit Court entered a final decree dismissing the bill as to all the defendants, with costs (pp. 150, 151), which was as follows :

United States Circuit Court—Eastern District of Texas.

S. W. Carey *et als.*
vs.
The Houston and Texas Central Railway Company *et als.*

This cause came on to be heard on the bill as amended, replications and evidence on file, and on a motion of the complainants for a decree against Nelson S. Easton and James Rintoul, trustees, B. A. Shepherd, trustee, Robert Brewster, Gus Mayhoff and C. L. Beisner, defendants, named in the bill and properly served with process, and against whom judgments *pro confesso* have been heretofore entered under the rules of Court.

Whereupon, after argument and consideration, and for the reasons on file, it is ordered, adjudged and decreed that the motion for final decree against Nelson S. Easton and James Rintoul, trustees, B. A. Shepherd, trustee, Robert Brewster, Gus Mayhoff and C. L. Beisner b[illegible]nd the same is, hereby refused, as, under the findings and conclusions herein made in favor of the other defendants, the relief prayed for is not proper to be decreed.

And it is further ordered, adjudged and decreed that the bill of complainants S. W. Carey and others against the Houston and Texas Central Railway Company and others be, and the same is hereby, dismissed as to all the defendants, with costs.

November 14th, 1892.

Don A. Pardee,
Circuit Judge.

The opinion of the Court below is in the record, and printed for this motion (pp. 143–150 ; 52 Fed Rep., 671).

On December 3, 1892, the complainants prayed two several, separate and duplicate appeals from this final decree ; one to the Circuit Court of Appeals for the Fifth Judicial Circuit, and the other to the Supreme Court of the United States (pp. 151–152).

The prayer for an appeal from the decree to the Circuit Court of Appeals was as follows :

"The above-named complainants considering themselves aggrieved by the decree rendered and entered on the 16th day of November, 1892, in the above-entitled cause, do hereby appeal from said decree to the Circuit Court of Appeals for the Fifth Judicial Circuit of the United States, and they pray that their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Fifth Judicial Circuit of the United States."

The appeal was allowed as follows :

"And, now to wit, on this 3d day of December, 1892, it is ordered that the appeal be allowed as prayed for.

"Don A. Pardee,
"Circuit Judge."

The prayer for an appeal to the Supreme Court of the United States, at the same time, was in the same words, as follows :

"The above-named complainants conceiving themselves aggrieved by the decison rendered on the 16th day of November, 1892, in the above-entitled cause, do hereby appeal from said decree to the Supreme Court of the United States, and they pray that their appeal may be allowed ; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States."

This appeal was allowed, as follows :

"And now to wit, on this 3d day of December, 1892, it is ordered that the appeal be allowed as prayed for.

"Don A. Pardee,
"Circuit Judge."

On December 3, 1892, the Circuit Judge signed two citations, directed to several of the defendants, returnable thirty (30) days from that date, pursuant to the several appeals, in the Circuit Court of Appeals, and in the Supreme Court of the United States, respectively (pp. 178-179).

On December 5, 1892, an appeal bond in the sum of $500 on each of the several appeals, approved by the Circuit Judge, was filed in the office of the Clerk of the Circuit Court (pp. 172-177).

The complainants filed in the Circuit Court an assignment of errors on their appeal to the Circuit Court of Appeals, containing a specification of fifty-five (55) alleged errors in the decree of the Court below, dismissing their bill of complaint (pp. 153-163), and also an assignment of errors on their appeal to the Supreme Court of the United States, containing a specification of forty-four (44) alleged errors in that decree (pp. 163-171).

The case has been docketed and the record thereof filed in the

Circuit Court of Appeals, and also in the Supreme Court of the United States.

The case is thus on appeal in the two appellate courts at the same time.

The jurisdiction of the Circuit Court of the United States for the Eastern District of Texas over the suit in which the present appeal was taken from the final decree therein directly to this Court, was not "*in issue*" in the case, nor was the case one that involved the construction or application of the Constitution of the United States.

No question involving the jurisdiction of the Circuit Court over the case in which the present appeal was prayed, or over the foreclosure suit mentioned in the bill, was "*certified to the Supreme Court from the Court below for decision*," under Section 5 of the Judiciary Act of March 3, 1891; nor, so far as appears from the record, was any application made to the Circuit Court in this case for a certificate presenting to the Supreme Court for decision any question involving the jurisdiction of the Court below over or in those cases, or either of them, determined by that Court in this suit.

The final decree of the Circuit Court dismissing the bill in the case, upon its merits, was not the subject of an appeal directly to this Court under the Act of March 3, 1891.

ARGUMENT.

I.

The jurisdiction of this Court by direct appeal from final decisions of the Circuit Courts is prescribed and limited by the provisions of Section 5 of the Act of March 3, 1891, C. 517, entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes."

1. The Court has often and recently said that although its appellate powers are given by the Constitution of the United States, they are nevertheless limited and regulated by Acts of Congress, and that it can exercise, therefore, no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress.

Nat. Exch. Bank vs. Peters, 144 U. S., 572.
Amer. Const. Co. vs. Jacksonville Railway, 148 U. S., 378.

The Judiciary Act of 1891 provides for the distribution of the entire appellate jurisdiction of the national judicial system, between the Supreme Court of the United States and the Circuit Court of Appeals, therein established, by designating the classes of cases in respect of which each of those two courts shall respectively have final jurisdiction.

McLish vs. Roff, 141 U. S., 666.
Lau Ow Bew's case, 144 U. S., 56.

The act has uniformly been so construed and applied by this Court as to promote its general purpose of lessening the burden of litigation in this Court, transferring the appellate jurisdiction in large classes of cases to the Circuit Court of Appeals, and making the judgments and decrees of that Court final, except in extraordinary cases.

Amer. Const. Co. vs. Jacksonville Railway, 148 U. S., 382.

The 5th section of the Act of March 3, 1891, defining the six specified classes of cases in which alone appeals or writs of error may be taken from the Circuit Courts directly to this Court, provides as follows:

> "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts *direct to the Supreme Court* in the following cases:
>
> In any case in which the jurisdiction of the Court is *in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision.*
>
> From the final sentences and decrees in prize causes
>
> In cases of conviction of a capital or otherwise infamous crime. In any case that involves the construction or application of the Constitution of the United States.
>
> In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.
>
> In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

26 Stat. 826.

By Section 6 of the Act, the appellate jurisdiction from final decisions of the Circuit Court *in all cases other than those provided for in Section 5*, is conferred upon the Circuit Court of Appeals, and its judgments or decrees are final in all cases in which the jurisdiction depends entirely on the citizenship of the parties, as well as in cases arising under the patent laws, the revenue laws, or the criminal laws, and in admiralty cases.

2. There can be no question, therefore, that the present appeal should be dismissed, unless the record which has been brought here shows affirmatively that the case comes within one of the six classes of cases specified in this 5th section of the Judiciary Act of 1891, in which appeals or writs of error may be taken from the Circuit Courts directly to this Court.

II.

The case in which the present appeal was taken is, manifestly, not included in, or embraced by, the first class of cases specified in Section 5 of the Act of 1891, namely, cases "in which the jurisdiction of the Court is in issue," and in respect to which it is provided that "the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision."

1. It is obvious that the question of jurisdiction to which the act refers, and which it declares "*alone shall be certified to the Supreme Court from the Court below for decision,*" is a question involving the jurisdiction of the Circuit Court *over the case in which the final judgment or decree sought to be brought here was rendered, and in which the writ of error or appeal is taken.*

A question involving the jurisdiction of the Circuit Court over the parties or the subject matter of the particular case in which the writ of error or appeal is taken, must have been "*in issue*" in the suit in that Court; and such question of jurisdiction must have been decided by the Circuit Court against the party seeking to bring it up to this Court for determination; and such question of jurisdiction must be "*certified to the Supreme Court from the Court below for decision.*"

The three conditions must be shown to co-exist, by the record before this Court; otherwise no writ of error or appeal in the case will lie directly to this Court from the judgment or decree of the the Circuit Court.

It is firmly settled that an affirmative description of the appellate jurisdiction of this Court, in a statute, implies a "*negative of the exercise of such appellate power as is not comprehended within it.*"

Durousseau vs. U. S., 6 Cr., 314.
Nat. Exch. Bank vs. Peters, 144 U. S., 573.

The provision in section 5 of the Act of 1891, referred to, was no doubt suggested by the Act of February 25, 1889, c. 236, relative to the review by this Court of the judgments or decrees of the Circuit Courts, in cases in which questions involving the jurisdiction of the Court therein had been raised upon the record, and decided against the plaintiff in error or appellant.

That Act provided that, in cases where the decree or judgment of the Circuit Court did not exceed the sum of five thousand dollars, the Supreme Court should not review any question raised upon the record, except a question of jurisdiction put in issue in the case.

The present act restricts and confines the power of this Court in *all* suits in which its appellate jurisdiction is invoked by reason of a question involving the jurisdiction of the Circuit Court over the case to the examination and review of such question of jurisdiction.

The purpose of the act was to give a party to a suit in the Circuit Court, in which a question involving the jurisdiction of the Court over the parties or subject matter of the case was raised and put "in issue" upon the record, by appropriate pleadings, at the proper time, a right to a review by this Court of the decision of the Circuit Court upon such question of jurisdiction, after final judgment or decree against him in that Court.

McLish vs. Roff, 141 U. S. 661, 668.
Chicago, &c., Railway Co. vs. Roberts, 141 U. S., 690.
N. P. R. Co. vs. Amato, 144 U. S., 465.
Joy vs. Adelbert College, 146 U. S., 355.
Schunk vs. Moline, &c., Co., 147 U. S., 500.

In the leading case of *McLish vs. Roff*, the Court said that the Act of 1891 did not contemplate "*several appeals in the same case and at the same time*," and observed:

> "No such provision can be found in the Act, either in express terms or by implication. The true purpose of the Act, as gathered from its context, is that the writ of error or appeal, may be taken only after final judgment except in the cases specified in Section 7 of the Act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify that question to this Court."

The Act of 1891 contains the requirement that the question of jurisdiction so "in issue," in the case, and decided by the Circuit Court, "*shall be certified to the Supreme Court from the Court below for decision,*" a requirement which was not prescribed by the Act of February 25, 1889.

The act declares that the question of jurisdiction "in issue" in the case in which the appeal is taken, and such question of jurisdiction alone, "shall be certified by the Circuit Court to this Court for decision."

The provision for a *certificate* showing the question of jurisdiction "in issue" in the case, and decided by the Circuit Court, made at the time the appeal upon such jurisdictional question is taken to this Court, is express and unqualified; and such a certificate is a necessary prerequisite to any valid appeal directly to the Supreme Court, under this provision of the 5th Section of the Act of 1891.

A part of the scheme of the Court of Appeals Act is to provide for the certification by the inferior Courts to this Court of questions within its appellate jurisdiction, as is shown by the provision in the 5th Section of the act under consideration, and the provision in the 6th Section of the act, by which the Circuit Court of Appeals, "in any subject within its appellate jurisdiction," may certify to this Court questions or propositions of law for its determination.

This Court has held that a certificate under the sixth section of the act must be in all respects formal, regular and sufficient; otherwise, the case will be dismissed without consideration by the Court.

C. H. & D. R. R. Co. vs. McKeen, 149 U. S., 259.

In the case of an appeal upon a question of jurisdiction in issue in the suit, under the fifth section of the act, a proper certificate by the Circuit Court presenting such question for the determination of this Court, is a necessary prerequisite to the exercise by this Court of appellate jurisdiction in the case.

In such a case a certificate of that kind cannot be dispensed with or waived any more than a prayer for and a due allowance of an appeal.

2. It follows from what has been thus said that no appeal lies directly to this Court from the final decree of the Court below in this case, and that the present appeal from that decree cannot be

entertained by this Court under the provision referred to in the first clause of Section 5 of the Court of Appeals Act of 1891.

The jurisdiction of the Circuit Court over the case in which the present appeal was taken from the final decree therein directly to this Court, was not put "in issue" in the suit by the defendants, who alone could contest the jurisdiction of the Court below over the parties or the subject matter of the suit, and no question involving the jurisdiction of that Court in respect either to the parties or the subject matter of the case, was decided by the Circuit Court against the complainants and appellants here.

The complainants and appellants, by filing their bill in the Court below, of course, affirmed and invoked the jurisdiction of that Court over the whole case as exhibited in the bill, in respect both to the parties to the suit and the subject matter of the cause, and it was for the defendants, if they chose, to put "in issue," by appropriate pleadings, any question involving the jurisdiction of the Court below over the cause.

The Court below assumed jurisdiction of the case, as made in the bill, and adjudicating the case upon the bill, answers, and proofs of the parties, dismissed the bill as to all the defendants upon the merits.

Moreover, as has been observed, the record contains no certificate by the Circuit Court certifying to this Court for decision a question involving the jurisdiction of the Circuit Court over the parties to the suit or the subject matter of the suit put "in issue" therein, and decided against the complainants by that Court, and no application was made by complainants to the Circuit Court to grant any such a certificate at the time they took the present appeal.

3. It is entirely clear, therefore, that the complainants were entitled to no appeal directly to the Supreme Court in this case from the final decree therein dismissing their bill of complaint, upon the ground that the case was one in which the jurisdiction of the Circuit Court was "in issue," and that this Court cannot entertain the present appeal from that decree under the provision of the first clause of Section 5 of the Court of Appeals Act of 1891.

III.

There is no color of ground for the theory that the bill in chancery, in this case, sought to impeach the jurisdiction of the Court below over the suit for the foreclosure of the mortgages of the Houston and Texas Central Railway Company, or its jurisdiction to make the decree of foreclosure and sale of May 4, 1888, passed in that suit, and that for that reason, or upon that ground, this Court has direct appellate jurisdiction from the final decree of the Circuit Court dismissing the bill exhibited in this case.

I. It has been shown that under the Court of Appeals Act of 1891, the question involving the jurisdiction of the Circuit Court upon which an appeal lies directly to this Court to review the decree of the Circuit Court, in a suit in that Court, is a question of the jurisdiction of the Circuit Court over *that* suit, and which was put "in issue" therein upon the record by appropriate pleadings of the party entitled to contest the jurisdiction of the Court over the suit.

The act contains no warrant for a direct appeal in *one* suit upon a question involving the jurisdiction of the Circuit Court over *another* suit in the same Court, although such jurisdictional question may have been involved in the issues between the parties to the suit in which the appeal is taken.

No such anomalous and incongruous appellate jurisdiction and proceeding are contemplated by the statute, which plainly authorizes, as seen, a direct appeal to this Court upon a jurisdictional question, only upon a question involving the jurisdiction of the Circuit Court over the particular case in which the appeal from the decree therein is prosecuted.

The suit to foreclose the mortgages on the railroad property, in which the decree of May 4, 1888, was rendered, was *one* case in the Court below, and the suit of the appellants in that Court to impeach that decree for pretended fraud, and to prevent the consummation of the alleged plan of reorganization, was *another and distinct case* between wholly different parties, relating to some matters quite extrinsic and collateral to the issues in the foreclosure suit, as will be perceived upon a mere glance at the bill.

While the Court of Appeals Act would have authorized an appeal directly to this Court, in the latter case, upon a question involving the jurisdiction of the Circuit Court over that case, regularly put "in issue" therein, and decided against the complainants, it contains no authority, as has been seen, for such an appeal in that case, upon any question involving the jurisdiction of the Circuit Court over the former case, which may have been litigated in the latter case with the other matters alleged in the bill in that case.

The only existing statutory authority for a direct appeal to this Court from the final decree of the Circuit Court, in the case in which the present appeal is taken, upon a question of jurisdiction, is contained in the 5th section of the Act of 1891, which, of course, negatives the idea that such an appeal lies upon a question involving the jurisdiction of the Circuit Court over another and different case long since disposed of by that Court.

2. There can be no doubt, therefore, that the Circuit Court would have had no authority to certify to this Court for decision, in the present suit, any question involving the jurisdiction of that Court over the parties or subject matter of the suit to foreclose the mortgages on the property of the railway company, or its jurisdiction to make the decree therein of May 4, 1888, sought to be impeached by the bill in the present case.

The authority to certify to this Court for decision a question of jurisdiction "in issue" in a case in the Circuit Court, is limited to a question involving the jurisdiction of the Court over the case in which the decree appealed from was rendered, and is not extended to any jurisdictional question in relation to another suit in the Circuit Court, although such a question may have been a subject of contestation or decision in the case in which the decree appealed from was rendered.

If the Court below, therefore, had, in fact, certified to this Court for decison a question in relation to the jurisdiction of that Court over the foreclosure suit, at the time the appeal in the present case was prayed by the complainants, such a certificate would have been a nullity under the Act of 1891, and would have been no warrant for the exercise by this Court of any appellate jurisdiction.

The Court could not have entertained the present appeal upon a certificate in relation to any question affecting the jurisdiction of the Court below in the foreclosure suit, which may have been a subject of determination in the present case, when the final decree therein was rendered.

The two suits were separate and distinct cases, so far as their subjects matter and parties, respectively, were concerned, and an appeal and certificate could not have been granted in the latter suit upon a question involving the jurisdiction of the Court over the former suit, under the provision contained in the first clause of Section 5 of the Court of Appeals Act.

3. But the Circuit Court, in fact, did not certify to this Court for decision any question involving its jurisdiction over the foreclosure suit, or to render the decree passed therein, at the time the present appeal was prayed, nor was any application made by complainants to that Court for a certificate to this Court based upon a decision in the present case of any question in relation to the jurisdiction of the Circuit Court over the parties to or the subject matter of the foreclosure proceedings.

The Act of 1891 declares that a question of jurisdiction reviewable, and to be reviewed, by this Court, on direct appeal from a Circuit Court, shall be "certified to the Supreme Court from the Court below for decision."

It is clear, therefore, that in no view of the provisions of that Act, can the present appeal be entertained by this Court upon any question of the jurisdiction of the Court below over the foreclosure suit, decided by that Court in this case, inasmuch as the record contains no certificate by the Court below upon the present appeal presenting, or purporting to present, such a question to this Court for final review and determination.

If it would have been competent for the Court below, under the Act of Congress, to have certified to this Court for determination on the present appeal a question involving the jurisdiction of the Court over the foreclosure suit, decided by it in this case, this Court nevertheless can exercise no appellate jurisdiction in respect to such a question, by virtue of this appeal, in the absence of a proper certificate by the Circuit Court presenting such a question to it for determination, under the provision of the 5th Section of the Act of 1891, referred to.

4. It is thus manifest that the Supreme Court has no jurisdiction on the present appeal to review the decision of the Circuit Court upon any question of the jurisdiction of that Court over the foreclosure suit, or its jurisdiction to make the decree of May 4, 1888, passed therein, as to the property of the Houston and Texas Central Railway Company, which may or might have have been determined by that Court in this case, and that no errors can be assigned on this appeal to any decision of the Court below, in this case, upon any questions involving the jurisdiction of that Court over the parties to or the subject matter of the foreclosure proceedings against that company, mentioned in the bill of complaint.

It is immaterial whether any, and if any, what questions in regard to the jurisdiction of the Court below over those proceedings were the subject matter of contestation and decision in the suit in which the present appeal was prayed, as it is quite evident, in any view of the effect of the provision in Section 5 of the Act of 1891, which has been considered, that no such questions are brought before this Court for review and determination, by the operation of this appeal.

IV.

The bill in the case in which the present appeal was prayed was an original bill, in the chancery sense of the term, to impeach the proceedings and decree in the foreclosure suit for alleged fraud and collusion, and for other objects in respect to matters which were extrinsic or collateral to the issues in that suit.

1. In view of the explicit provisions of the statute to which we have referred, and their obvious construction and effect, as stated, it is quite unnecessary to examine the bill which was filed in this case, for the purpose of determining its legal character and its relation to the suits to foreclose the mortgages on the Houston and Texas Central Railway, to which the bill refers, for, whatever may be the nature of the bill, in the view of a court of chancery, no appeal lies

directly to this Court from the decree below upon any question involving the jurisdiction of the Circuit Court over the foreclosure suits.

But it is very clear upon the face of the bill that the technical gravamen of the case made by its allegations, was the pretended collusion and fraud charged in the procurement of the decree against the Railway Company, and in the other transactions in respect to which relief was sought against the defendants, and that the bill was an original bill for relief in respect to the matters alleged in it (Foster vs. Mansfield, &c., Railroad Co., 146 U. S., 88).

It is not perceived that the facts averred in the bill in respect to the suits to foreclose the mortgages on the railroad property, and the proceedings in those suits, show any want of jurisdiction as such in the Circuit Court over the parties to and the subject matter of those foreclosure suits and proceedings, and, of course, the vague allegations in the bill that the decree was "beyond the power of the Court to make it," and "that there was no foundation for said decree or jurisdiction in the Court to award it," amount to nothing in such a case.

It may be that the bill, in this case, was so far ancillary to the foreclosure suit and decree as to authorize the Court below to entertain the same without regard to the citizenship of the parties to the bill; but that is not a matter which can be considered upon the present direct appeal of the complainants to this Court from the decree of the Circuit Court dismissing the bill on its merits; nor is it one which, in any view of it, can affect or determine the intrinsic nature and character of the bill itself in the estimation of a Court of Chancery, or the jurisdiction of the Supreme Court, to entertain the present appeal.

2. It is clear, therefore, that the complainants in the bill, so far as the present appeal is concerned, can take nothing by the nature of the suit in which the appeal is prosecuted, and that the character of the suit can give no support to the jurisdiction of this Court to entertain a direct appeal from the decree which dismissed the bill therein for want of equity out of the Circuit Court.

V.

The case in which this appeal was prayed manifestly is not one "that involves the construction or application of the Constitution of the United States;" nor is it within any of the other classes of cases mentioned in Section 5 of the Judiciary Act of March 3, 1891.

1. It is understood that appellants would suggest that the case in which they prayed the present appeal to this Court, falls within the class of cases designated in the fourth clause of Section 5 of the Act of 1891 as a case "that involves the construction or application of the Constitution of the United States."

It seems very clear that such a contention would be without foundation in any reasonable or sensible interpretation of the Statute.

The provision is that "appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court * * * in any case that involves the *construction* or *application* of the Constitution of the United States."

Plainly, the "case" wherein the complainants sought an appeal direct to this Court is not one that involves the "*construction*" or the "*application*" of the Constitution of the United States within the meaning of the Statute.

The bill in which the "case" of the complainants was stated referred to no provision of the Constitution of the United States upon which they relied for the action of the Court in the vindication of their supposed rights, or which was presented for construction or application by the Court.

No question upon the construction or application of the Constitution of the United States was in issue between the parties upon the record, or determined by the final decree of the Circuit Court, and the Constitution of the United States was not construed or applied, in the sense of the Statute, by the Court below when it rendered its decree dismissing the bill as to all the defendants.

It cannot be said, as ground for this appeal, that the case is one which involved in the Circuit Court the "construction or application" of the Constitution of the United States, because the question arose therein whether the Circuit Court had jurisdiction of the suit or suits to foreclose the mortgages by virtue of its possession of the property through its receiver, under the doctrine affirmed and applied by this Court in the case of *Morgan's Company vs. Texas Central Railroad* (137 U. S., 171, 201), or because the bill alleged irregularities, informalities and errors in the course and conduct of the foreclosure proceedings, which, it was claimed, would have enabled the railway company upon a direct appeal to avoid the final decree of sale.

2. It will not be pretended, we apprehend, that the case is within any of the other four classes of cases designated in Section 5 of the Act of 1891, in which appeals are authorized to be taken from final decisions of the Circuit Courts directly to the Supreme Court.

VI.

The appeal of the complainants to the Supreme Court should be dismissed also upon the ground that they took at the same time another and similar appeal from the final decree of the Circuit Court dismissing the bill in the case to the Circuit Court of Appeals for the Fifth Circuit, where the case is pending upon that appeal.

1. The fourth section of the Judiciary Act of March 3, 1891, provides that "the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States, or in the Circuit Courts of Appeals hereby established, according to the provisions of this act, regulating the same" (26 Stat., 826).

Section 6 of the act provides that the Circuit Courts of Appeals established by the act shall exercise appellate jurisdiction to review, by appeal or by writ of error, final decision in the existing Circuit Courts *in all cases other than those provided for in Section 5 of the Act*, unless otherwise provided by law.

This Court has said that the Act of 1891 does not contemplate "*several separate appeals in the same case and at the same time to two Appellate Courts.*" No such provision, the Court declares, can be found in the act, either in express terms or by implication. When final judgment or decree is entered in the Circuit Court, the party against whom it is rendered must determine whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case.

McLish vs. Roff, 141 U. S., 658.

2. By the clear and necessary effect of the Act of 1891, a party who takes an appeal in a case from the final decree therein to the Circuit Court of Appeals, is precluded from then or afterwards taking or claiming another and separate appeal from that decree directly to the Supreme Court of the United Stales under Section 5 of the Act.

By Section 6, the appellate jurisdiction from final decisions of the Circuit Court is conferred on the Circuit Courts of Appeals "*in all cases other than those provided for in the preceding section of this act.*"

A party proposing to appeal from the final decree of a Circuit Court, must determine for that purpose whether or not the case is one of those provided for in Section 5 of the act, and whether an appeal should be taken by him direct to this Court, or to the proper Circuit Court of Appeals.

If he takes an appeal from the final decree in the case to the Circuit Court of Appeals, he conclusively affirms in effect that the case is *not* one provided for in the 5th section of the act, for the purpose of direct appeal to the Supreme Court, and is precluded from claiming or asserting a right to a direct appeal to that Court.

He cannot take several separate appeals from the same decree, in the same case, at the same time.

By taking an appeal from the decree to the Circuit Court of Appeals, the party necessarily waives or foregoes any right he may have had to an appeal direct to this Court, in the case, under Section 5 of the Statute, and such a direct appeal to this Court cannot legally be allowed to him.

If such an appeal should be formally allowed, it will be dismissed by this Court as soon as its attention is called to it by proper motion.

When the case is taken by appeal to the Circuit Court of Appeals, it resides there until disposed of by that Court, and the law provides no place for it or any part of it in the Supreme Court of the United States at the same time.

3. It is clear, therefore, that the appeal prayed by the complainants to this Court, and which was allowed at the time they prayed and were allowed an appeal to the Circuit Court of Appeals, from the final decree of the Circuit Court, as stated, was allowed improvidently in the Court below, and that the same should be, therefore, dismissed by this Court.

VII.

The motion to dismiss the appeal, it is respectfully submitted, should be granted by the Court.

J. Hubley Ashton,
Charles H. Tweed,
Adrian H. Joline,
Counsel appearing specially for Appellees.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 912.

STEPHEN W. CAREY AND OTHERS,
Appellants,
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY AND OTHERS,
Appellees.

APPELLANTS' BRIEF AND ARGUMENT IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF CROSS-MOTION.

JEFFERSON CHANDLER,
A. J. DITTENHOEFER,
Counsel for Appellants.

C. G. Burgoyne, cor. Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

STEPHEN W. CAREY and others,
Appellants,

vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY and others,
Appellees.

No. 912.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Appellants' brief in opposition to the motion to dismiss, and in support of appellants' cross-motion.

Appellants, in opposition to the motion to dismiss made by the appellees herein, and in support of their motion to adjourn the hearing upon the motion to dismiss until the necessary record be printed, and to argue orally the merits of the appeal, submit the following:

I. The "Extracts from the Record" filed by the appellees in support of their motion, show upon the face thereof that vital portions of the record have been omitted from said extracts essential to be considered by the Court in the determination of the merits of the motion.

The bill in this case is in the nature of a bill of review attacking the decree made in a suit in equity in the United States Circuit

Court for the Eastern District of Texas, entitled "Nelson S. Easton *et al.* vs. The Houston and Texas Central Railway Company *et al.*," and known upon the docket of said Court as "Consolidated Cause No. 198." The bill of review attacks the foreclosure proceedings and the decree for errors upon their face, and places in issue the jurisdiction of the Court to entertain said proceedings, to grant said decree and to take the complainants' property thereunder. The said proceedings and decree on their face, as we contend, are void. The record in Consolidated Cause No. 198 shows, as hereinafter more fully set forth, that the Court had no jurisdiction to grant the decree and that the proceedings in the said cause resulted in taking possession by defendants of the railway property of the Houston and Texas Central Railway Company without due process of law and in violation of the rights of the stockholders of the railway company and by an abuse of judicial power.

On final hearing in the Court below the appell~~ees~~ants in support of the allegations of their bill introduced in evidence *without objection* the record in said Consolidated Cause No. 198, and also evidence which shows, as we contend, that the decree in said cause was non-judicial, a mere consent decree without evidence to support it, entered without a hearing before the Court, placed upon its files in disregard of, and without reference to, the pleadings in said cause, and in violation of the mortgages involved. The appellees also read and introduced in evidence various portions of the said record.

The learned trial Judge below throughout his opinion (Extracts from Record, p. 143) seeks to maintain the jurisdiction of the Court and the right to take the property of the appellants upon the records and proceedings in the Consolidated Cause and other records not included therein; and, in allowing the appeal and certifying the record to this Court on the issue of jurisdiction, the trial Judge through the Clerk of the Court duly certified those proceedings and other records to this Court; but the "Extracts from the Record" contain neither the decree, which is the subject of attack, nor any of the records in Consolidated Cause No. 198 or said other records, nor any of the evidence introduced to show the invalidity of the proceedings and decree and the want of jurisdiction in the Court to grant it.

Counsel in their brief and argument upon the motion to dismiss find it necessary to refer to the pleadings and proceedings in Cause No. 198, resulting in the decree to review which this bill was filed. This Honorable Court cannot review the decision of the Court below on the question of jurisdiction, and the application of the

Constitution of the United States to the proceedings, without having before it the record upon which that decree was made, as fully as that record was considered by the Court below. Where the papers upon a motion to dismiss an appeal do not contain the record proper and essential for the consideration of such motion, it will not be entertained.

On a motion to dismiss an appeal from the Circuit Court, the Supreme Court say: "The further consideration of this motion is postponed until the case is heard on its merits. The record has not been printed, and counsel do not agree as to what it contains. We will not decide the motions to dismiss before the record is printed when there is any question about the facts on which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file."

Nat. Bank vs. Insurance Co., 100 U. S., 43.

Again, where the appellee moved to dismiss the writ of error, to affirm the decision below, to strike out assignments of error and to advance the causes, the Supreme Court say: "These are writs of error to the Supreme Court of New Jersey, and the motions to dismiss are made because, as is claimed, no federal question is involved. The records have not been printed, and on these motions we can look only to the statements of counsel as they appear in the briefs. The assignment of errors has been printed in the brief of the defendants, and the second and fifth assignments clearly present questions of which we have jurisdiction. Whether the errors thus assigned appear in the records we cannot, on these motions as they are now presented, finally determine, but, in the absence of any showing to the contrary, we will presume they do. The motions to dismiss must, therefore, be overruled."

Crane Iron Co. vs. Hoagland, 108 U. S., 5.

Again the Supreme Court say: "The judgment in this case is for less than five thousand dollars, but the record contains a certificate of division. The motion to dismiss is on the ground that the Court has no jurisdiction upon such a certificate as is filed herein. The record has not been printed, and in The National Bank vs. Insurance Co., 100 U. S., 43, we announced the rule that, to get decision on a motion to dismiss before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file. In this case we have not been furnished either with a copy of the certificate on which the motion depends, or with an agreed statement of what it contains In fact, there is nothing on which we can act, unless we go to the transcript."

Waterville vs. Van Slyke, 115 U. S., 290.

II. If the Court determines to entertain the motion to dismiss the appeal upon the "Extracts from the Record," we respectfully submit that that motion cannot prevail.

The question of jurisdiction of the Court below is in issue, and is the issue which was decided by the Court below against the appellants, and to review which this appeal was taken and allowed. The bill herein was filed to review (in the only way permissible by equity procedure) the jurisdiction of the Court to grant a decree under which appellants were divested of their property. The bill directly tendered the issue of the want of jurisdiction in the Court to grant the decree attacked. It was claimed, and, as we contend, proven, that the Court acted without jurisdiction; that there was not the requisite diversity of citizenship in the parties to the foreclosure suit, as appears on the face of the record; that the decree entered was a consent decree, and not the result of judicial procedure; that no evidence whatever as to the issues raised was taken and no hearing had, and by the terms thereof the mortgages which were foreclosed were violated, disregarded and over-ridden, the pleadings in the suit were contradicted, and, as appears from the face of this so-called record and decree, over five million dollars were directed to be paid, not due in any event, and over twenty-one million dollars of debt directed to be paid years before it matured.

The bill herein was aimed at the jurisdiction of the Court below to do this. The appellees joined issue with us on this question of jurisdiction by denying that there was want of power in the Court to do what it did do.

A bill of review, or a bill in the nature of a bill of review, whose object is to arrest or reverse judicial proceedings for an abuse of judicial power or for defects therein and want of conformity to law by the Court in taking such proceedings, or for want of jurisdiction in the Court to entertain and carry on the proceedings appearing on the face of the proceedings attacked, puts in issue the grounds of attack make upon such proceedings set up in the bill of review, or bill in the nature of a bill of review; such a bill is a continuation of the proceedings attacked. This proposition is too well established to need argument. The following authorities are cited in support of it:

Willamett Iron Bridge Co. vs. Hatch, 125 U. S., 1.
Krippendorf vs. Hyde, 110 U. S., 276.
Dewey vs. Coal Co., 123 U. S., 329.
Johnson vs. Christian, 125 U. S., 646.
Pac. R. R. Co. vs. Mo. Pac. R. R. Co. 111 U. S., 505.

The very nature of a bill of review or bill in the nature of a bill of review is a writ of error begun in the Court where the proceedings attacked were had. It is respectfully submitted that there is not an adjudication in this Court on this subject that does not sustain the proposition that the infirmities, defects and want of lawfulness of proceedings when attacked by a bill of review or a bill in the nature of a bill of review become a part of the proceedings attacked and the issues tendered in said bill, and met in the answer, and are the issues in the case to be tried and disposed of, like other issues; and where the jurisdiction of the Court rendering the proceedings attacked is put in issue by the allegations in the bill of review or bill in the nature of a bill of review, and the answers deny the allegations of the bill. an issue is then and there made on the question of jurisdiction by bill and answer. The bill in the nature of a bill of review affirming the want of jurisdiction of the Court to render the proceedings attacked, tenders an issue of jurisdiction of the Court, and when such issue is met and disposed of by the Court below an appeal lies thereon to this Honorable Court under the present law.

Campbell vs. Railroad Co., 1 Woods, 268.
Willamett Bridge Co. vs. Hatch, 125 U. S., 1.

This Court must, in the very nature of the case, first define jurisdiction in its judicial sense and scope, and, after so defining it, determine from the record on file in this Court bearing upon the issue of jurisdiction whether the jurisdiction so defined is in issue by the pleadings in the case appealed from. Appellees, in their brief accompanying the motion to dismiss, do not define jurisdiction. They do not even discuss what constitutes it. They feel safer in denying it than in describing it. The jurisdiction of a Federal Court primarily springs from the Constitution of the United States. That instrument declares, Sec. 1, Art. 3, that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain or establish." Section 2 declares that "the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; * * * to controversies between citizens of different States, etc."

The jurisdiction, so far as it is hereinabove defined by the Constitution, consists, for the purposes of this case, in the possession by the Court from the Constitution of *judicial power* in this case, to render the decree it did render. The Constitution does not define *judicial power:* it accepts the definitions of that power theretofore established as a part of the jurisprudence of England then prevailing. Under these definitions, accepted by the founders of the Constitution, judicial power does not consist of judicial appearances, but of judicial action in a case brought into court in the manner prevailing in such previous practice, and prosecuted agreeably to the laws and rules of procedure then and since prescribed. The essentials of the exercise of such power in determining a cause in equity are that a bill must be filed in court setting up a cause of action therein. An oral statement by the parties, in the presence of the Judge, of a case in equity, would be an idle ceremony.

A judgment unsupported by a cause of action is a foundationless structure.

McAllister vs. Kuhn, 96 U. S., 87.
Slacum vs. Pomery, 6 Cranch., 221.
Bank of U. S. vs. Smith, 11 Wheat., 171.
Thomson vs. Wooster, 114 U. S., 104.
Ohio Cent. R. R. vs. Central Trust Co., 133 U. S., 83.
Elliot on Appellate Procedure, Sec. 471.

The bill or written pleading must state a cause of action. A bill resting upon *nudum pactum* would present nothing to adjudicate. If a bill filed be answered, no decree can lawfully be rendered over the head of an issue made by the answer without a trial or judicial inquiry, and without the hearing of evidence.

A decree is void not only when rendered by a Court without jurisdiction of the subject matter or of the parties, but also when *upon the face of the record* it is unauthorized. Though a Court has acquired jurisdiction of the parties and of the subject matter, its decree may nevertheless be void, because in the progress of the case *it exceeded* that jurisdiction or failed to proceed judicially.

Ex parte Lange, 18 Wall., 163.
Windsor vs. McVeigh, 93 U. S., 274.
Seamster vs. Blacklock, 83 Va., 232.
Ex parte Wilson, 114 U. S., 421.

Ex parte Parks, 93 U. S., 18.
Ex parte Siebold, 100 U. S., 371.
Griffith vs. Frazier, 8 Cranch, 9.
Elliott vs. Piersol, 1 Pet., 329.
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Judicial power contemplates that the Court shall proceed in the way marked out by the law of its procedure. It can exercise its jurisdiction in no other way.

There is no wrong without a remedy. The tribunals possessing equity power may abuse that power through ignorance, venality or partiality. When so abused to the injury of a litigant, such abuse becomes a distinct wrong, which the law redresses. A court of equity has no jurisdiction to ignore the law of its constitution or of its procedure. It cannot shrink below the law or raise above it. Arbitrary power is excluded from its authority, and the personal opinions and views of the Judge of the court not consistent with the judicial deductions judicially flowing from the allegations of the pleadings and the evidence in the case, are depraved substances, corrupting judicial power, and no part of it. The pleadings fix the limit of judicial power in a given case, and a decree beyond these limits is void.

In the beginning of the administration of justice, abuses of judicial authority were among the wrongs suffered by the people brought in contact with such authority; whereupon the law provided remedies by appeals in some cases, and by bills of review and bills in the nature of bills of review, in other cases.

III. The appellants contend, and as we claim, the record shows that they have been deprived of their property without due process of law. The decree attacked was placed upon file by the unlawful consent of the directors of the defendant railway company, and in violation of their trust.

The said directors had no power or jurisdiction to change the terms of the mortgages involved in the foreclosure proceedings, either by consenting to a decree of foreclosure or by any other action of the board collectively or individually. The statutes of Texas deny such power to a board of railroad directors. Sec. 4220, Vol. 11 of the Revised Statutes and Laws of Texas declares, that "no "mortgage by such corporations" (speaking of railroad corporations) "shall be valid unless authorized by a vote of two-thirds of all the "stockholders of such company after notice and in the manner pro-tution, the laws of the United States, and treaties made, or which shall be made, under their authority ; * * * to controversies between citizens of different States, etc."

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"vided in this title for increasing the capital stock of such corpo-"rations."

The rights of the stockholders, and the terms of the mortgages foreclosed, were violated without reference to the issues presented in the Consolidated Cause, as alleged in the bill herein. We contend, and the record shows, that the entire procedure resulting in this so-called decree was non-judicial and without due process of law, and the application of the Constitution is directly involved in this appeal, as appears from the record certified to this Court.

Due process of law means law in its regular course of administration.

1st Desty, 5-10.
James vs. Reynolds, 2 Tex., 251.
Wilkinson vs. Leland, 27 U. S., 658.
Pearson vs. Yewdall, 95 U. S., 294.

A court of equity has no jurisdiction to obliterate the divisions between equity practice and the practice in actions at law in Federal Courts.

The equity jurisdiction of the Courts of the United States is derived from the Constitution and laws of the United States.

Noonan vs. Braley, 2 Black, 499.

Under the Constitution and laws of the United States and the rules of this Court, the usages of the High Court of Chancery of England furnish the chancery law which is administered in all the States by the Federal Courts.

Pa. vs. Wheeling & B. Bridge Co., 13 How., 518.

The chancery jurisdiction given by the Constitution and Laws of the United States is the same in the Federal Courts in all the States of the Union, and the rule of decision is the same in all.

Boyle vs. Zacharie, 6 Pet., 648.
U. S. vs. Howland, 4 Wheat., 108.

The Constitution of the United States establishes the distinction between law and equity; and a party who claims a legal title must proceed at law, and may proceed according to the practice in the State Court.

Fenn vs. Holme, 21 How., 481.

Jurisdiction, as between the law side and the equity side of the Federal Courts, must be determined by the essential character of the case. Unless it comes within some of the recognized heads of equitable jurisdiction, the remedy of the party is at law.

Van Norden vs. Morton, 99 U. S., 378.

Where the relief prayed for is such as a court of law is competent to grant, a court of equity has no jurisdiction, although the complainant's estate is merely an equitable one.

Fussell vs. Gregg, 113 U. S., 550.

In a case where an ordinary action at law was brought in a State Court and removed to the United States court, where a bill in equity was substituted by leave of court and the suit progressed as a suit in chancery, it was held that the constitutional distinctions between the two kinds of proceedings could not be obliterated in the Federal Courts by State legislation, and the decree in the Federal Court was reversed.

Thompson vs. Central Ohio R. R. Co., 73 U. S., 134.

Equitable relief in aid of demands cognizable in the Courts of the United States only on their law side cannot be sought in the *same action*, although allowable in State Courts by virtue of State legislation.

The Circuit Court has jurisdiction to determine whether or not a case was properly removed to it, and the Supreme Court has jurisdiction to pass upon that determination, and to order the lower court to do what it ought to have done.

Cates vs. Allen, 149, U. S., 451.

Under the foregoing authorities it is shown to be legally imposssible to append a controversy in equity to an original controversy at law. For instance, if suit were brought against a railway company for damages resulting from personal injuries, a mortgagee could not intervene by original cross-bill in that proceeding and set up that the corporation was insolvent, and that if the plaintiff in the law case should succeed in getting a heavy judgment against the company it would cripple it, and pray therein that he be permitted to intervene, have Receivers appointed and foreclose his mortgage. Such an attempt to ingraft equitable procedure upon a legal controversy pending against the company would be without jurisdiction. A court of equity must acquire its jurisdiction primarily on its own account and cannot obtain it in a secondary manner as an incident to a proceeding at law.

The learned Judge below attempts, in his opinion (Extracts from Record, p. 145) to vindicate the equitable jurisdiction of the Court in the foreclosure suit, mainly on the fact that the Court acquired possession of the railway property originally in an action at law commenced by the Southern Development Company, Cause No. 185, for the collection of a debt and the appointment of Receivers therein, which action is shown by the record to have been dismissed on demurrer on the ground of want of equity.

As to the two other actions, Nos. 183 and 184, referred to by the learned Judge, it is respectfully stated that in neither of said actions did the Court take possession of the railway property, which fact appears from the record.

Secondary possession could not be derived through *that case*. (No. 185) Jurisdiction in equity must be shown on the face of the bill in equity itself; otherwise, there is none.

> Cates vs. Allen, *supra*.
> Thompson vs. Central O. R. R., *supra*.

A court of equity has no jurisdiction to render a decree in violation of the pleadings and exhibits thereto attached to the injury of defendant in a case in which said decree is rendered.

> Chicago, etc., R. R. Co. vs. Fosdick, 106 U. S., 70.
> Espier vs. Corll, 35 Ohio St., 236.
> White vs. Jones, 38 Ill., 159.
> Davis vs. Eppinger, 18 Cal., 378.
> Connolly vs. Woods, 31 Kan., 359.
> Follansber vs. Scottish Am. M. Co., 7 Ill. App., 486.
> Am. & Eng. Ency. of Law, 278.

The record on file in this Court sharply presents the question of the right of the Court, under a paper called a decree, filed by consent and without authority, and, as we contend, through collusion, to declare due mortgages which upon their face are not due, to take under that decree the property of the stockholders without giving them a hearing, without regard to the pleadings in the suit in which the decree was entered, and without taking any testimony and without any judicial hearing whatever, and condemning them to pay over twenty-one million of dollars in no aspect of the case due, to enable them to save their property. If that be due process of law, then the decree attacked must stand; otherwise, it must fall. Therefore, the question that this record presents, in addition to the issue of jurisdiction, is the application of that provision of the Constitution which declares that no person shall be deprived of his property without due process of law.

IV. There was no jurisdiction in the Court below to precipitate the payments of the contracts of the defendant company in advance of their maturity on the ground of the insolvency of the said company.

The only judicial power existing under the Constitution of the United States to impair or modify contracts as they are made by the parties is the power and jurisdiction of bankruptcy. A court of equity gets no jurisdiction through the status of insolvency. Its jurisdiction is limited to enforcing contracts as made by the parties to them. A court of bankruptcy, however, is created under the Constitution to deal with insolvency of debtors; its jurisdiction rests upon the *status of insolvency*. It may distribute the debtor's estate in payment of contracts not due, to the extent that the assets of the debtor will accomplish this, if the debtor be judicially found to be insolvent and to come within the terms of the law dealing with insolvent debtors. Insolvency is synonymous with bankruptcy (Kunzler vs. Kohns, 5th Hill, 317). The inability of a debtor to pay his debts is the basis of bankrupt jurisdiction. This fact furnishes no primary jurisdiction to a court of equity (*Ibid.*, 321). A debtor being declared bankrupt surrenders his estate to be applied by distribution on his obligations as they then stand, whether due or not. In such distribution all creditors share alike. There is no arbitrary selection by a court of bankruptcy of one class of creditors over another. The distribution of the estate is uniform (Morse vs. Hovy, 1 Barb. Ch., p. 406; *In re* Klien, 1 How., 277, Note). The directly granted power over bankruptcy carries the *incidental authority* to modify the obligations of contract so far as an equitable distribution of the estate requires it (same authorities). A court of equity as distinguished from a court in bankruptcy enforces contracts as they are made. It has no power to modify or change them, or to precipitate the payment of obligations before their maturity. The fact of insolvency of the debtor does not contribute to the jurisdiction of a court of equity to modify contracts set up therein for their enforcement. It handles the estate to preserve the terms of contracts pending in and being considered by it. It has no jurisdiction whatever under any circumstances to modify, impair or dissolve contracts because of insolvency of the maker thereof, or for any reason.

The general jurisdiction of equity over corporate bodies does not extend to the power of dissolving the corporation or of winding up its affairs and sequestrating the corporate property and effects in the absence of express statutory authority.

High on Receivers, Sec. 288.
Bangs vs. McIntosh, 23 Barb., 591.
Howe vs. Duel, 43 Barb., 504.
Waterbury vs. Express Co., 50 Barb., 157.
Neall vs. Hill, 16 Cal., 145.
French Bank Case, 53 Cal., 495.
Trust Co. vs. R. R. Co., 101 N. Y., 478.

V. The case has been properly certified to this Court and the issue of jurisdiction duly certified.

Upon referring to the transcript of the record it will be seen that the Clerk of the Court below has duly certified the record to this Court, his certificate reading as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES }
For the Eastern District of Texas, at Galveston. }

I, C. DART, Clerk of the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record, assignment of errors, and all proceedings in the case in cause No. 228 on the equity docket of said court, entitled S. W. Carey *et al.* vs. The Houston and Texas Central Railway Company *et al.*, as the same now appears on file and of record in my office.

[Seal United States Circuit Court, Eastern District of Texas.]

To certify which witness my hand and the seal of said Court at Galveston, in said district, this the 4th day of March, A. D. 1893.

C. DART,
Clerk U. S. Circuit Court,
Eastern District of Texas.

NOTE: Exhibits "F," "G" and "H" to defendants' testimony, introduced by complainants, are omitted from this transcript by direction of complainants' solicitors as unnecessary, the same being merely railroad schedules issued by the Receivers of the railway; also, all interventions filed in equity causes, Nos. 198 and 185, and reports and orders relative thereto, are omitted by direction of the solicitors for complainants as unnecessary on the hearing of the appeal.

C. Dart,

Attest: Clerk U. S. Circuit Court,

Eastern District of Texas.

The above form of certificate is the one, we are advised, that has been adopted in the various circuits in transmitted records to this Court under the Act of 1891, including cases where the appeal or writ of error is taken to bring up the questions of jurisdiction. The appeal having been taken and allowed, it becomes the duty of the Court below, through its clerk, to certify the record, and by the Act of 1891, the Court is required only to certify the record showing the issue of jurisdiction. When, therefore, that record is sent to this Court with the certificate attached, presumably the Court has followed the directions of the act, and has certified what was deemed necessary to review the decision upon the issue of jurisdiction.

In the case of McLish vs. Roff, 141 U. S., cited upon the appellee's brief, the record was certified in the form the record is in this case. In that case it appears also that counsel especially requested the Court to make a specific certificate certifying the question of the jurisdiction involved for review by this Court. That was denied, and then a writ of error was sued out in the ordinary way, and the record certified as in this case.

The assignment of errors presented to the learned trial Judge below, upon which the application for the allowance of this appeal was made, sets forth that the issue of jurisdiction, as well as the application of the Constitution of the United States, was sought to be reviewed by this Court on the appeal intended to be taken, and the appeal was allowed by the trial Judge, and, as part of the record, the assignment of errors was certified by him through the Clerk of the Court.

But the improper certification of the record—assuming there be an imperfection—presents no reason for dismissing the appeal. The right to appeal to this Court under Section 5 of the Act of 1891 is absolute where the jurisdiction of the Court is in issue, or in any case that involves the application of the Constitution of the United States. The right being absolute, and the appeal having been taken and allowed, it cannot be dismissed because the Clerk or Court below has not properly certified the record. If the record is not complete, or if the certificate be not in proper form, the remedy is to correct the record or certificate, not to dismiss an appeal which has been properly taken, and to which the appellant is entitled as a matter of right.

United States vs. Adams, 6 Wall, 101.

If the Judge below had refused to give any certificate as the trial Judge did in the case of McLish vs. Roff *(supra)* appellees' position is that no appeal would lie to this Court. That, manifestly, is not the proper construction of the act. Under Section 5 the right to appeal is absolute, and a litigant cannot be deprived of that right by an omission of the Court or Clerk to properly certify the record. If the Circuit Court of Appeals desires the instruction of this Court for its proper decision, the questions or propositions of law concerning which that Court desires instructions must, under Section 6 of the Act, be certified to this Court, and whether such certificates shall be issued or not rests entirely in the discretion of the Circuit Court of Appeals, depending entirely upon its desire for instructions, and upon the issuance thereof depends the jurisdiction of the Supreme Court to decide the questions or propositions (Columbus Watch Co. vs. Roberts, 148 U. S., 266); but where the appeal is taken by the defeated party under the Fifth Section of the Act, which gives him the *right* to appeal, it is not then a question of discretion with the the lower Court as to whether they will certify, and their refusal to properly certify, or the sending up of an improper certificate, in no way affects the appeal itself.

VI. The assertion of appellees that an appeal is now pending in the Circuit Court of Appeals is no ground for dismissing an appeal properly taken to this Court.

There is no rule of this Court, nor any statute of the United States governing the proceedings in this Court, which requires the Court to dismiss a cause within the appellate jurisdiction of this Court because of an alleged or real error committed by appellant in appealing a different hemisphere of the same cause to the Circuit Court of Appeals. This Court will not perplex itself with nor determine on a motion the legality of another appeal on different issues to another Court. It has no jurisdiction to weigh any offense against the jurisdiction of the Circuit Court of Appeals until the question of the effect of an appeal to that Court comes to this Court in the regular way on a properly certified record from that Court.

This case is brought here in the exercise of an absolute right of appeal given by the statute on the issues here pending. The cause being properly here on such issues, it should be heard, and said issues decided. The legal effect of the pendency at the same time of another branch of the same cause in the Circuit Court of Appeals is not in issue here. The issues on which the appeal is pending in the Circuit Court of Appeals are not issues reviewable here. The motion to dismiss does not, in the 5th section thereof relating to this branch of the case, affirm that two appeals have been taken to different courts on the same issues.

This Court finds herein issues presented to it on appeal, over which it has final appellate jurisdiction, and over which it alone has appellate jurisdiction.

United States vs. Sutton, 47 Fed. Rep., 129.

It finds that final judgment has been rendered by the Circuit Court on these issues against appellants. It finds an appeal direct to this court on those issues under Section 5 of the Judiciary Act of March 3, 1891. Appellees seek to escape a hearing here on such issues by suggesting that there is pending in the Circuit Court of Appeals an appeal to that court in the same case. The motion to dismiss is not accompanied by a transcript of the record showing what issues are pending in that court, nor is the record in this court printed in support of the motion showing the real issues pending in this Court.

This Court not having jurisdiction of the issues pending in the Circuit Court of Appeals, will not travel out of its own field of positive jurisdiction into a negative field of jurisdiction to find in that latter a reason for denying to itself its own positive jurisdiction. Moreover, the motion to dismiss on the alleged ground of double appeal is repugnant and destructive of itself. Appellees cannot, in a motion to dismiss, blow hot and cold any more than in any other pleading. The motion affirms in Sections 2, 3 and 4 thereof that there is no appeal in law pending in this Court; that the appellate jurisdiction of this Court has not in law attached to this case. This being one proposition, how can it be argued by the same party who makes it, that the case is in law pending on appeal, both in this Court and in the Circuit Court of Appeals.

It is respectfully submitted that the inconsistency of the motion in this respect is fatal to appellees.

It is also respectfully suggested that whether a case can be appealed to this Court under Section 5th of the Act of March 3, 1891, on the issues therein made reviewable here, and can also be appealed to the Circuit Court of Appeals on issues not made reviewable here under Section 6th of the same act, is a new question, and, it may safely be said, is in some obscurity and uncertainty. It is not just to litigants to visit upon them punishment for the uncertainties in the law. Until some authoritative decision be made upon the real questions pending, or some rule of this Court be adopted defining the rights of litigants under the law, they should not be made to suffer for construing the law, in order to get redress, differently from the construction finally put upon it by the Court. A lawyer has no jurisdiction to finally decide a case ; it is his duty and his right to present it to the Court and to guard himself so far as he can from all uncertainties in the interpretation of the law. To do so is a merit of the profession, not an act to be punished. Where a case was taken to this Honorable Court by appeal, and also by writ of error, the Court declined to dismiss on motion.

Hunt vs. Hollingsworth, 94 U. S., 111.

Appellants' counsel have inquired of every Circuit Court of Appeals in the United States to learn the practice under the circumstances involved in this case, and find no uniform rule yet established in respect of it.

It is respectfully submitted to the Court, therefore, that, under any view that may be taken of the case, the appeal herein ought not to be dismissed on this ground.

In taking an appeal to this Court on the question of jurisdiction, the appellant does not take a double appeal. He brings up for review that question which the act specifies must be brought to this Court for adjudication. The act does not intend that a litigant must be deprived of his right to review the question of jurisdiction by this Court by an appeal upon other questions to the Circuit Court of Appeals. By Section 6 of the act, the judgment of the Circuit Court of Appeals is declared to be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States. What was intended by the act, we believe, is that an appeal can be taken to this Court in a case in which the jurisdiction is sought to be reviewed, or in the other instances mentioned in Section 5, but that does not deprive him of the right to a review upon the merits by the Circuit Court of Appeals which section six grants.

In the case of McLish vs. Roff, cited by the appellees, the only question passed upon by the Court was the right of an appeal or writ of error before final judgment. The Act of 1891 took effect March 3, 1891, and the McLish case was argued October, 1891. It was the first case, we believe, that came before this Court under that act. The defendant filed a demurrer to the bill, which was overruled, and the defendant required to proceed with the trial of the cause upon the merits. Thereupon, and before final judgment he sued out a writ of error from this Court. After this Court passed upon the question of the right to sue out a writ of error at that stage of the litigation, it disposed of all there was in the case before the Court for decision. The question of the method to be pursued by the defeated party to secure a review after final judgment was not before the Court.

VII. This motion substantially involves a consideration of the entire appeal, and in connection with their cross-motion appellants have offered to print the record on file in this Court at their own expense, and thus the merits of the appeal which are involved in the motion to dismiss can be argued orally. As the appeal involves the determination of the question of jurisdiction in the Court below, it in any event would be entitled to a preference, and upon a hearing given by this Court the appeal itself can be disposed of in connection with the motion to dismiss, in which motion are interwoven the very questions involved in the appeal.

Jefferson Chandler,
A. J. Dittenhoefer,
Counsel for Appellants.

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Jefferson Chandler,
A. J. Dittenhoefer,
Counsel for Appellants.

Office Supreme Court U. S.
FILED.
OCT 21 1893
JAMES. H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

STEPHEN W. CAREY and others,
Appellants,
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY and others,
Appellees.

No. 912.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

To J. HUBLEY ASHTON, ESQ., CHARLES H. TWEED, ESQ., and ADRIAN H. JOLINE, ESQ., Counsel of Record for the Appellees in the above-entitled cause:

PLEASE TAKE NOTICE that the appellants in the above-entitled cause will, on Monday, the 23d day of October, 1893, upon the coming in of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, in connection with the argument to be submitted by appellants on the motion of appellees to dismiss the appeal in this case, submit for the consideration of the Court a motion to adjourn the hearing upon said motion to dismiss, to have the record printed as certified to the Supreme Court of the United States from the Court below, to have said motion to dismiss set down for hearing and consideration by the Court at a time convenient to said Court after the printing of said record shall have been accomplished, and to be permitted to argue orally said motion to dismiss the appeal herein on the merits.

Dated New York, October 16, 1893.

JEFFERSON CHANDLER,
A. J. DITTENHOEFER,
Counsel for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

Stephen W. Carey and others,
Appellants,

vs.

The Houston and Texas Central Railway Company and others,
Appellees.

No. 912.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

Motion to adjourn hearing upon motion to dismiss appeal, to have the necessary record printed, and to be permitted to argue orally the merits of the appeal.

Now come appellants in the above-entitled case and give the Court to know that the motion of appellees filed herein to dismiss the appeal in this case involves the merits of the appeal to this Court, and all the questions involved therein. Appellants therefore move the Court to order those parts of the record not printed and filed in support of the motion to dismiss the appeal, to be printed, which appellants are ready to pay for when ordered, and further move the Court to adjourn the hearing upon, and submission of, the motion to dismiss the appeal until the said parts of the said record not printed be printed, and to fix a time in the near future suiting the convenience of the Court, when oral arguments may be heard on the merits of said motion to dismiss said appeal, and appellants herein request and move that they be permitted to argue the merits of said appeal orally at the time and under the circumstances hereinbefore mentioned, and in support of said motion submit the following propositions:

I. The only grounds of appeal to this Court are, the issue of jurisdiction of the Court below, as that issue is presented by the record, and the application of the Constitution of the United States to the proceedings appealed from. In the brief of appellees served upon appellants in support of the motion to dismiss, both the said questions are taken up and discussed by appellees, and constitute the merits of the controversy pending in this Court on appeal.

II. The extracts from the record presented by appellees in support of their motion to dismiss, do not contain sufficient of the record to decide the questions discussed by appellees in their brief, there being omitted therefrom the following parts of the record on file in this Court:

1. The pleadings and decree and record of sale thereunder in the prior proceedings, known as Consolidated Cause No. 198, in the Court below, made a part of the pleadings in this case, and introduced in evidence by both parties. The entire record as certified to this Court by the Court below, shows on its face want of jurisdiction in said Court to render the said decree and sell the property described therein in pursuance thereof.

2. The testimony herein, showing that appellees and other stockholders of the Houston and Texas Central Railway Company were deprived of their property without a trial or hearing, and without due process of law, in violation of the Constitution of the United States.

The said testimony, together with the record in said Consolidated Cause No. 198, show that no judicial action of the Court was taken in rendering said decree in said Cause No. 198, and in making said sale, but that the same was accomplished without a hearing, and without testimony, in violation of the several mortgages ordered to be paid, and that the said decree and the sale thereunder were for a large sum of money, amounting to about $5,000,000.00 in excess of the amount defendant company owed in any event, and for more than $21,000,000.00 not then due. All of which papers are included in the record certified to, and on file in this Court.

It is therefore essential to a consideration of the questions involved, that the entire record bearing on said questions should be printed and presented to the Court for consideration, in passing upon the motion to dismiss.

III. The said questions above mentioned constitute the merits of this appeal, and appellants should be permitted to argue the merits of the cause orally for that reason.

IV. Appellants cannot so adequately present their case in a printed argument as they can in a printed and oral argument on the merits.

Jefferson Chandler,
A. J. Dittenhoefer,
Counsel for Appellants.

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FILED.
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Supreme Court of the United States.

OCTOBER TERM, 1893.

STEPHEN W. CAREY, AND OTHERS,
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, AND OTHERS.
No. 912.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Statement for Appellees on Motion of Appellants to Adjourn the Hearing upon the Motion of Appellees to Dismiss the Appeal in the Above-Entitled Case, &c.

I.

The counsel for the appellees have caused to be printed all such parts and portions of the record as in their judgment were necessary to be printed for the proper presentation to the Court of their motion to dismiss the appeal in this case, and to enable the Court to act understandingly upon the motion without reference to the somewhat bulky transcript on file.

The paper book, entitled "*Extracts from the Record on motion of appellees to dismiss the appeal,*" contains, as will be perceived, copies of the original bill and the amended bill filed by the appellants, as complainants, in the Circuit Court, the answers of the defendants to the bills, the replications placing the cause at issue, the opinion delivered by the Circuit Judge in deciding the case, the final decree of the Circuit Court dismissing the bill as to all of the defendants, the two appeals, and the appellate proceedings thereon, to the Circuit Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States, and the assignment of errors on the appeal to the Circuit Court of Appeals, as well as the assignment of errors on the appeal taken to this Court.

The counsel for the appellees deemed it wholly unnecessary to print *the proofs* taken by the parties in the suit, and they think the learned Court will perceive upon an inspection of their motion to dismiss, that it is not called upon to examine those proofs, in order to dispose of the jurisdictional questions, presented by that motion, under the Judiciary Act of 1891.

It will be observed that one of the grounds of the motion to dismiss the present appeal, is, that these appellants, at the time they took that appeal, took another and similar appeal from the same decree to the Circuit Court of Appeals, where the case is now pending upon that appeal.

The case is, in fact, in both appellate courts upon *duplicate* appeals taken at the same time from the same decree.

The transcripts on file in both Courts, we understand, are substantially identical, and are, in fact, duplicate copies of the record of the suit in the Circuit Court.

The counsel for the appellees, of course, have no objection to the appellants filing printed copies of the entire transcripts, but they think, as suggested, that it will be found that the appellees have printed all the papers which are of the slightest benefit or advantage to the learned Court in determining the questions upon the provisions of the Judiciary Act involved in their present motion to dismiss, and that the additional papers are not calculated to facilitate the Court in the disposition of the motion.

II.

It appears by the statements in the motion of the appellants, in this connection, as was suggested by us in our brief upon our motion to dismiss the appeal, that they have not assumed to appeal directly to this Court from the final decree of the Circuit Court dismissing their suit, upon any claim that the jurisdiction of the Circuit Court over *that* suit, was "*in issue*" therein, but that they have assumed to appeal directly to this Court from that decree, upon the ground that some question as to the jurisdiction of the Circuit Court to render a decree in ANOTHER and prior suit, "*known as Consolidated Cause No. 198,*" was involved in their suit in that Court.

The present direct appeal, in this suit of the appellants, can not be predicted upon or supported by a question involving the jurisdiction of the Circuit Court over "*Consolidated Cause No. 198,*" in that Court, under the provisions of section 5 of the Court of Appeals Act of 1891; and if such a question of jurisdiction had been, in fact, *certified* by the Circuit Court to this Court for decision upon the present appeal the certificate plainly would have been a nullity, as unauthorized by the Statute.

The statement in the motion that one of the grounds of appeal to this Court is "the application of the Constitution of the United States to the *proceedings appealed from,*" seems to involve misapprehension also in regard to the proper meaning and effect of that other provision

The paper book, entitled "*Extracts from the Record on motion of appellees to dismiss the appeal,*" contains, as will be perceived, copies of the original bill and the amended bill filed by the appellants, as complainants, in the Circuit Court, the answers of the defendants to the bills, the replications placing the cause at issue, the opinion delivered by the Circuit Judge in deciding the case, the final decree of the Circuit Court dismissing the bill as to all of the defendants, the two appeals, and the appellate proceedings thereon, to the Circuit Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States, and the assignment of errors on the appeal to the Circuit Court of Appeals, as well as the assignment of errors on the appeal taken to this Court.

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The present direct appeal, in this suit of the appellants, can not be predicted upon or supported by a question involving the jurisdiction of the Circuit Court over "*Consolidated Cause No. 198*," in that Court, under the provisions of section 5 of the Court of Appeals Act of 1891; and if such a question of jurisdiction had been, in fact, *certified* by the Circuit Court to this Court for decision upon the present appeal the certificate plainly would have been a nullity, as unauthorized by the Statute.

The statement in the motion that one of the grounds of appeal to this Court is "the application of the Constitution of the United States to the *proceedings appealed from*," seems to involve misapprehension also in regard to the proper meaning and effect of that other provision of section 5 of the Act of 1891, which gives this Court jurisdiction to review by direct appeal the final decree of a Circuit Court in a case that involves the construction or application of the Constitution of the United States.

It is not understood what is meant by "the application of the Constitution to the *proceedings appealed from*," unless the reference is, as it plainly seems to be, to the proceedings in the other case, "*known as Consolidated Cause No. 198;*" but the present appeal, as may be again observed, is not an appeal from the decree of the Court below in that "Consolidated Cause, No. 198," but is an appeal from the decree dismissing the bill of the present appellants against the present appellees, a totally different cause, with different subjects-matter and different parties, in the Court below.

That bill, as the learned Court will perceive, does not mention the Constitution of the United States, or any provision whatever of that instrument, or ask the Court to construe or to apply any provision of the Constitution of the United States in determining the rights therein asserted by the complainants.

Plainly, the case in which the present appeal was taken, is not one "that involves the construction or application of the Constitution of the United States," within the meaning of section 5 of the Court of Appeals Act of 1891.

These very brief observations seem to show that the questions of jurisdiction raised by the present motion to dismiss the appeal, under the two clauses of section 5 of the Act of 1891 referred to, are fairly and adequately presented by the portions of the transcript on file which have been printed by the appellees for the purposes of the motion.

The other question, as to the effect of the duplicate appeal to the Circuit Court of Appeals, presented by the motion to dismiss the appeal to this Court, is one which necessarily arises upon the face of the appellate proceedings below, in the cases of the two appeals, which are contained in full in the printed paper-book of the appellees submitted with their present motion.

III.

As to the application of the appellants for an oral argument upon our motion to dismiss the appeal, we only desire to say that we are prepared, and should be glad to avail ourselves of an opportunity for an oral discussion of the question involved, if the Court desires it or thinks that it would in anywise facilitate its disposition of the motion; the whole question seems to be so simple that we should not have felt ourselves justified in asking for an oral argument; but, of course, we are always glad to avail ourselves of such a privilege, if the Court is inclined to hear an oral argument upon the question; and we venture to express the hope that if the Court shall be inclined to order an oral hearing, it shall be arranged for as early a day as may be convenient to the Court, in order that the final disposition of the question as to whether this appeal was well taken or not, may not be unnecessarily delayed.

J. HUBLEY ASHTON,
CHARLES H. TWEED,
ADRIAN H. JOLINE,
Counsel for Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 912.

STEPHEN W. CAREY AND OTHERS, APPELLANTS,

vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY AND OTHERS, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Additional Memoranda Showing the Sufficiency of the Bill in this Case, and that a Decree Rendered under the Circumstances of this Case as Shown by the Record is Void.

1. A BILL OF REVIEW BY A PARTY TO A SUIT, OR A BILL IN THE NATURE OF A BILL OF REVIEW BY A PRIVY TO THE SUIT OR A REMAINDERMAN, IS ESSENTIALLY A WRIT OF ERROR.

A bill of review is in the nature of a writ of error, and its object is to procure an examination and alteration or reversal of a decree made upon a former bill, which decree has been signed and enrolled.

Story's Eq. Pl., sec. 403.

In American practice judgments and decrees are deemed in law enrolled as of the term they are passed, whether actually enrolled or not.

Ibid., sec. 403.
Whiting *vs.* Bank of U. S., 13 Pet., 6.

Such a bill may be brought for errors of law appearing upon the face of the decree. It is ground for a bill of review that the decree was not warranted by the allegations in the bill.

Story's Eq. Pl., sec. 405.
Goodhue *vs.* Churchman, 1 Barb. Chan. Rep., 596.

For the purpose of examining all errors of law on the face of the decree, the bills, answers, and other proceedings are, in our practice, as much a part of the record before the Court as the decree itself, for it is only by comparison with the former that the correctness of the latter can be ascertained.

Story's Eq. Pl., sec. 407.
Dexter *vs.* Arnold, 5 Mason Rep., 211.
Holmes *vs.* Proud, 1 Chan. Cases, 54.
Wyatt Pr. Reg., 98.
Hollingsworth *vs.* McDonald, 2 Harr. & John Reps., 230.
Webb *vs.* Pell, 3 Paige Rep., 368.
Whiting *vs.* Bank of U. S., 13 Pet., 6.

Parties interested in the estate affected as remaindermen are entitled to this remedy.

Story's Eq. Pl., sec. 409.

A bill in the nature of a bill of review is limited to matters of substance and is available for all errors on the face of a decree or of the record, except matters of form merely.

Ibid., sec. 411.

A bill in the nature of a bill of review states the grounds of law on which it seeks to impeach the record. If the former decree has been carried into execution, the bill may pray a further decree of the Court to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed

Ibid., sec. 420.

Where a decree has been obtained by fraud, the Court will restore the parties to their former situation, whatever their rights may be. This kind of a bill may be filed without leave of the Court being first obtained for the purpose, the fraud used in obtaining the decree being the principal point in issue.

Ibid, sec. 426.

In Sheldon *vs.* Aland, 3 P. W., 111, the chancellor says: "I admit a decree, much more an interlocutory order, if "made by collusion, may be set aside by petition; *a fortiori* "may the same be set aside by bill."

"Where, in a proceeding to review a judgment for error "of law, the judgment is reversed, an appeal from such judg- "ment of reversal lies."

Keepfer *vs.* Force, 86 Ind., 81.

"An appeal from a judgment on a bill of review will lie "wherever an appeal in the original case which it is sought "to have reviewed will lie."

Klebar *vs.* Town of Corydon, 80 Ind., 95.

Stockholders cannot come into foreclosure proceedings if they conform to the mortgages and to the law and practice governing such proceedings. It is only when the proceedings violate the trust, the law, or the practice of the court that a stockholder may appear in court to vindicate the trust and the law.

The stockholder could not come into the original suit by motion without being governed by the pleadings already filed. Nor would a petition for rehearing answer his purpose in a case like this, because he could only be heard on the issues presented previous to his petition for rehearing. His only remedy, therefore, is by bill in the nature of a bill of review, setting up want of jurisdiction in the court and the errors on the face of the decree, and attacking it for collusion and fraud between the parties.

Richter *vs.* Jerome, 123 U. S., 233.
Campbell *vs.* R. R. Co., 1 Woods, 368.

"An action for review, when successful, does not finally "dispose of the original cause; it merely reverses the judg-"ment and leaves the court to proceed again."

Leech *vs.* Perry *et al.*, 77 Ind., 422.

"A judgment in a proceeding to review a former judg-"ment, either granting or refusing the review, puts an end "to the action for a review, and is a judgment from which "an appeal will lie."

Brown *et al. vs.* Keyser, 53 Ind., 85.

An appeal lies from a judgment either sustaining or denying a bill of review.

Elliot on Appellate Precedure, sec. 87.

2. THE FORECLOSURE DECREE ATTACKED BY THE BILL HEREIN IS VOID.

A judgment is a judicial determination of a cause agitated between real parties. In order to make a judgment there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites not one exists in the case of a fraudulent and collusive suit. There is no judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause presented to him. There is no party litigating, there is no party defendant, no real interest brought into the case.

2 Black on Judgments, sec. 508.
Earl of Brandon *vs.* Beecher, 3 Clark & Fin., 510.

A consent decree filed by the court is an administrative act, not a judicial one.

Tex. Pac. R. R. Co. *vs.* S. P. Co., 137 U. S., 56.

When both sides of a controversy are represented by one interest, as is shown by the record in this case, the judgment is a nullity.

South Spring Hill Min. Co. *vs.* Amador Medean Gold Min. Co., 146 U. S., 300.

A decree taken upon untried issues of fact, as was done in this case, is void.

Widmer *vs.* Martin, 87 Cal., 88.

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